Supreme Court, U.S.
FILED
03 972 JAN 01 2004
OFFICE OF THE CLERK

No. 03-___

IN THE

Supreme Court of the United States

CAROL PAPPAS, JOHN H. PAPPAS, JR., and HARRY J. PAPPAS,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, and FREMONT STREET EXPERIENCE PARKING CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

---

PETITION FOR WRIT OF CERTIORARI

BARRY LEVENSTAM
Counsel of Record
JEREMY M. TAYLOR
JOHN W. JOYCE
MELINDA E.A. CUPPS
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Supreme Court of Nevada's reading of *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 29 (1984), violates the fundamental constitutional right of private property ownership by permitting local governmental agencies acting in the name of "economic redevelopment" to take property that is neither blighted nor surrounded by blight and give it to other private parties who supposedly can use that property more profitably on the theory that enhanced private profitability indirectly will benefit the public.

2. Whether the conflict among state courts interpreting *Berman* and *Midkiff* in addressing the extent to which local governmental agencies can take property from one private owner and give that property to another private owner in the name of "economic redevelopment" demonstrates the need to revisit and clarify the holdings of those decisions.

3. Whether, if the Nevada Supreme Court's reading of *Berman* and *Midkiff* is accurate, this Court must now revitalize the "public use" limitation placed on the power of eminent domain by the Fifth and Fourteenth Amendments in light of this Court's more recent decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and in light of recent abuses of that power in the name of "economic redevelopment."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THIS PETITION 12

I. This Court Should Issue The Writ Of Certiorari Because The Nevada Supreme Court's Reading of *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* Violates The Public Use Protection Of The Fifth And Fourteenth Amendments 14

II. This Court Should Issue The Writ Of Certiorari To Resolve The Conflict Among The State Courts Engendered By *Berman v. Parker* And *Hawaii Housing Authority v. Midkiff* 16

III. This Court Should Issue The Writ of Certiorari To Reconsider *Berman v. Parker* And *Hawaii Housing Authority v. Midkiff* In Light Of *Dolan v. City of Tigard*, To Resurrect The "Public Use" Protection Of The Fifth And Fourteenth Amendments, And Thereby To Restore The Fundamental Constitutional Right To Own Property 19

CONCLUSION 28

Appendix A: Opinion of Supreme Court of Nevada, September 8, 2003

Appendix B: Opinion of Clark County District Court, July 3, 1996

TABLE OF AUTHORITIES

Page

CASES

Adarant Contractors, Inc. v. Pena, 515 U.S. 200 (1995) . . 25

Berman v. Parker, 348 U.S. 26 (1954) . . . . . passim

Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897) 22

Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520 (1993) 25

Citizens' Savings & Loan Ass'n v. Topeka, 87 U.S. (20 Wall) 655 (1874) 21,22,26,27,28

City of Center Line v. Chmelko, 416 N.W.2d 401 (Mich. Ct. App. 1987) 18,19

City of Cincinnati v. Vester, 281 U.S. 439 (1930) 22

City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court, 5 P.3d 1059 (Nev. 2000) 9

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 28

Davis v. Passman, 442 U.S. 228 (1979) 27

Dolan v. City of Tigard, 512 U.S. 374 (1994) . . . . . passim

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 24

Hawaii Housing Authority v. Midkiff, 467 U.S. 29 (1984) . . . . . passim

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 28

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) . 25,26

Mayor v. Thomas, 645 So. 2d 940 (Miss. 1994) 18

TABLE OF AUTHORITIES – continued

Page

Old Dominion Land Co. v. United States, 269 U.S. 55 (1925) 22

Schneider v. District of Columbia, 117 F. Supp. 705 (D.D.C. 1953) 15

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 17

Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 768 N.E.2d 1 (Ill. 2002) 17,18,24

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 25

United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946) 22,23

CONSTITUTIONAL PROVISIONS

U.S. Const. art. V 24

U.S. Const. amend. V ..... passim

U.S. Const. amend. XIV ..... passim

STATUTES

28 U.S.C. ¯ 1257(a) 2

Nevada Community Redevelopment Law,

Nev. Rev. Stat. 279.382-279.685 8

Nev. Rev. Stat. 279.424 9

TABLE OF AUTHORITIES – continued

Page

PUBLICATIONS

1 *Records of the Federal Convention of 1787* 534 (Max Farrand ed., rev. ed. 1966) 20

Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (4th ed. 1775) 20

Dana Berliner, *Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain* 130-31 (2003) 13

Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest Group Perspective*, 3 Tex. Rev. L. & Pol. 49 (1998) 23,24

Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 365 (1928) 20

Friedrich A. Hayek, *The Road To Serfdom*, 103-04 (1944) 29

James W. Ely, Jr., *The Guardian Of Every Other Right: A Constitutional History of Property Rights* (Kermit L. Hall ed., 2d ed. 1998) .. 19,20,21,23

John Adams, *A Defence of the American Constitutions of Government of the United States of America* (1787-88), *reprinted in Democracy, Liberty, and Property* 126 (Francis W. Coker ed. 1942) 20-21

John Bartlett, *Familiar Quotations* 336 (Justin Kaplan ed., 16th ed. 1992) 20

TABLE OF AUTHORITIES – continued

Page

Karl Marx & Friedrich Engels, *The Communist Manifesto* (1848), *reprinted in 50 Great Books of the Western World* 425 (Robert Maynard Hutchins ed. 1952) 28-29

Mississippi Churning, Editorial, Wall St. J., Jan. 4, 2003, at A12 12

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) 19-20,23

Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986) 23

In The

Supreme Court of the United States

No. 03-

CAROL PAPPAS, JOHN H. PAPPAS, JR., and HARRY J. PAPPAS,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, and FREMONT STREET EXPERIENCE PARKING CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR WRIT OF CERTIORARI

Petitioners Carol Pappas, John H. Pappas, Jr., and Harry J. Pappas (collectively "the Pappas Family") respectfully petition this Honorable Court for a writ of

certiorari to review the judgment of the Supreme Court of Nevada.

OPINIONS BELOW

The majority and two dissenting opinions of the Supreme Court of Nevada are reported at 76 P.3d 2, 17, and 18, respectively, and are reproduced in Appendix A. Pet. App. 1a, 30a, and 33a, respectively. The decision and order of the District Court of Clark County is reproduced in Appendix B. *Id.* at 42a.

JURISDICTION

The opinion and judgment of the Supreme Court of Nevada were filed on September 8, 2003. The jurisdiction of this Court is grounded on 28 U.S.C. ¯ 1257(a). Within 90 days of September 3, 2003, Petitioners requested and received an extension of time until January 6, 2004 in which to file this Petition. This Petition is filed on January 6, 2004.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Parties and the Project

Petitioner Carol Pappas and her late husband John immigrated to this country from Greece; their adult sons, John Jr. and Harry, are also petitioners in this action. In the 1940s, the Pappas Family purchased two parcels of land totaling 7,000 square feet on the corner of Las Vegas Boulevard and Carson Street in Las Vegas, Nevada. The Pappas Family owned this property from the 1940s until possession of it was taken from them by respondent City of Las Vegas Downtown Redevelopment Agency ("Agency"), which promptly gave possession to respondent Fremont Street Experience Limited Liability Company ("LLC"), a cartel of casino owners, and its subsidiary, respondent Fremont Street Experience Parking Corporation (together, "Fremont Street respondents"). The Pappas Family had developed the subject property into a retail center, and leased space to small retail businesses. The small businessmen and women who were their tenants were also defendants below but none were able to continue the litigation to this point. Pet. App. 44a.

In November 1985, the Las Vegas City Council adopted a resolution for the establishment of a redevelopment agency and thus created the respondent Agency. The Agency consists of the City Council and City Manager of Las Vegas. *Id.* at 47a. Two weeks later, the Agency conducted a survey of blocks in the downtown area targeted for "redevelopment" to determine the overall conditions of the target area. The survey, which was submitted to the trial court, reflected no findings of blight on any of the surveyed blocks. Indeed the target area included the downtown casinos. The block on

which the Pappas property was located was not even surveyed. Despite the fact that the survey reflected no blight anywhere in the surveyed area, the Agency moved forward towards adopting a redevelopment plan. *Id.* In the sole public hearing on this redevelopment plan, held in February of 1986, city leader after city leader told a packed hall of citizens that the city would not use eminent domain to effectuate the plan. These comments are set forth in the trial court's opinion. *Id.* at 49a-54a. In March 1986, the City Council adopted its Redevelopment Plan. *Id.* at 54a.

For seven years, this Plan had no impact on the Pappas Family or its property. In September 1993, however, a cartel of casinos formed respondent LLC to transform a portion of Fremont Street into a gambling mall. Respondent LLC then formed respondent Fremont Street Experience Parking Corporation as a wholly owned subsidiary. Thereafter, the Fremont Street respondents entered into a Development Agreement with the Agency pursuant to which they would construct a parking garage with retail space on a city block bordered by Las Vegas Boulevard, Fremont Street, Carson Street, and Fourth Street, which the Agency agreed to acquire through eminent domain. *Id.* at 55a-56a. That block was occupied completely by unblighted retail and commercial properties, including the Pappas Family property. Across one street were certain casinos; across the other streets were businesses like banks and a savings and loan. *Id.* at 31a, 47a, 79a-80a.

The Development Agreement spelled out the purposes for the project and the taking that made it possible: "to enhance employment opportunities, keep companies from leaving the downtown area, attract new businesses to the

downtown area, and provide inducement to [LLC] member and non-member hotels and other businesses in the downtown area thereby benefitting the public and community at large." (Appellants' App. in Nev. Sup. Ct. at 1290-91.) Despite the fact that the Agency and the Nevada Supreme Court would later rely on the supposed elimination of "blight" to justify this taking under *Berman v. Parker*, 348 U.S. 26 (1954), this Development Agreement, like the survey used to justify it, makes no reference to blight. (*Id.*) There was no blight on or near the Pappases' property. Pet. App. 31a, 47a, 79a-80a..

Pursuant to this Development Agreement, the Agency agreed to pay $6.4 million to acquire the properties upon which the parking garage was to be constructed but the LLC was to pay any costs in excess of that sum. In addition, the Fremont Street respondents obtained a right to veto the sum that would be paid as just compensation for the property if that sum exceeded 10% of the "appraised value" as prepared by the Agency. After the taking, the Fremont Street respondents would then build and operate the parking lot and accompanying retail space and keep the revenues generated by those operations. *Id.* at 55a.

Nevada law requires that current landowners be invited to participate in the development of a project involving their properties. The Agency sent Carol Pappas a letter notifying her of its intent to develop a parking garage with retail space on the property and inviting her to submit an alternative proposal. Pappas timely responded by letter telling the Agency that she had no desire to sell the property and that she proposed in the alternative to participate in the

development of the parking lot by entering into a long-term ground lease with the city.[1] *Id.* at 56a.

There is no evidence that the Agency ever responded to this letter or considered this alternative proposal. Instead, some months later, in August 1993, the Agency offered to acquire her property for the Agency's assessed value, $340,000, adjusted downward to cover any environmental cleanup that might be necessary. Pappas refused to sell. *Id.* at 57a-58a.

The Trial Court Proceedings

On November 19, 1993, the Agency filed a complaint in eminent domain and a motion for order permitting immediate occupancy pending entry of judgment against the Pappas Family. Summons was served on Carol Pappas on December 8, 1993, making the answer due on January 8, 1994. *Id.* at 58a-59a.

Notice for the hearing on the Agency's motion for immediate occupancy, however, was unclear. Furthermore, the Agency's motion stated that access was necessary to conduct environmental tests. The Pappas Family permitted the Agency to come on the property on December 14, 1993 to conduct the tests. Pappas thus believed that this obviated the need for the motion. In fact, though its motion did not say so, the Agency wanted full possession of the property

---

1/ Because the Pappas Family was and remains willing to participate as a lessor of her property in the proposed parking lot, this case did not become moot when the city entered the land, tore down the buildings, and constructed the parking garage and retail space.

immediately for demolition, not just access for environmental testing. *Id.* at 60a.

The Agency appeared in court on the day following the testing, December 15, and proceeded without the Pappas Family present. The Agency represented that the Pappas Family did not oppose the motion for immediate occupancy despite knowing that the Pappas Family objected to the eminent domain proceedings and did not wish to relinquish possession of their property. The Agency also failed to inform the court that it had conducted the environmental testing identified in the motion on the previous day. *Id.* at 60a.

Unbeknownst to the absent Pappas Family, the trial court judge who presided over the hearing for immediate occupancy was an investor in one of the casinos that was a member of respondent LLC. He granted the motion, and then denied the Pappas Family's motion to reconsider. The Pappas Family then obtained new counsel, who moved successfully to have the initial trial court judge recuse himself. *Id.* at 60a-61a.

As the new trial court judge stated in ruling upon the Pappas Family's motion to dismiss: "What the Pappas Family had owned for nearly fifty years was stripped from them in less than 50 seconds in a summary proceeding on December 15, 1993 at which they were not even present." *Id.* at 60a.

The Pappas Family filed a motion to dismiss the condemnation suit, asserting that the taking violated the United States Constitution as well as the Nevada Constitution

and the Nevada Revised Statutes.[2] At the request of the Pappas Family, the trial court required the Agency to produce the full administrative record and transformed the motion into one for summary judgment. *Id.* at 61a, 86a.

The Trial Court's Ruling

In its July 3, 1996 opinion, the trial court phrased the question before it as follows: "The underlying question in this Motion to Dismiss is whether this taking is for a public use." *Id.* at 77a. The court answered the question "no," ruling that the taking suffered a series of constitutional and statutory shortcomings. First, the court concluded that the 1986 Redevelopment Plan, under which the Pappas Family property was taken, failed to define the redevelopment area with sufficient specificity and, in particular, included within the redevelopment area substantial areas of property › including some of the casinos themselves as well as the Pappas Family property › for which there was no evidence of blight. Indeed, as the trial court held, the survey upon which the Agency based the 1986 Redevelopment Plan showed no blight anywhere in the affected area. *Id.* at 79a-86a. Thus, the court held that the designation of the redevelopment area was "arbitrary and capricious." *Id.* at 86a.

Next, the trial court held that the notice provided to the Pappas Family failed to inform them of their right to challenge the conclusion that their property was blighted. *Id.* at 86a-87a. The court also concluded that the Agency failed to amend the 1986 Plan to include the 1993 Fremont Street

---

2/ The Agency based the Fremont Street Experience project, and the condemnation of the Pappas Family's property, on the Nevada Community Redevelopment Law, Nev. Rev. Stat. ("NRS") 279.382-279.685. Pet. App. 56a, 62a-63a.

Experience project. Had the Agency amended the Plan, as required, it would have had to issue additional notice and hold new public hearings. *Id.* at 87a-91a.

Additionally, the trial court held that the Agency also failed to comply with the requirement in NRS 279.424(2) that the Agency show it was unable to obtain the Pappas property by any other means. In this regard, the court noted that respondent LLC (which consisted of ten casinos worth billions of dollars) never even attempted to negotiate a market sale with the Pappas Family. The court held: "The takings clauses of the United States and Nevada Constitutions do not envision the Government as the transfer agent between two private landowners." Pet. App. at 93a. For all of these reasons, the trial court concluded that the taking was unconstitutional.[3]

The Nevada Supreme Court's Ruling

The Nevada Supreme Court summarily rejected a series of procedural arguments and addressed the ruling concerning the unconstitutionality of the taking on the merits. The Court first analyzed the issue of "public use." *Id.* at 11a-12a. Relying heavily on *Hawaii Housing Authority v. Midkiff*, 467 U.S. 29 (1984), the Court stated that "so long as a

---

3/ After the trial court granted this motion to dismiss, related proceedings were assigned to another judge. Citing the appearance of impropriety, that judge recused himself because he had received campaign contributions from casinos that stood to benefit from a taking of the Pappases' property. *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 5 P.3d 1059, 1060 (Nev. 2000). A "chain reaction of subsequent recusals" followed because so many judges had accepted similar campaign contributions from those casinos. *Id.* Eventually the Nevada Supreme Court issued a writ of mandamus requiring a judge who had recused himself to retain the case despite those contributions. *Id.* at 1063.

redevelopment plan, or any individual redevelopment project, bears a rational relationship to the eradication of physical, social or economic blight, it serves a public purpose within the power of eminent domain." Pet. App. at 12a-17a. Ignoring the specific findings of the trial court concerning the absence of blight, the Court held: "Although the [Fremont Street project] benefits the casino consortium that was willing to finance the project, its focus is to provide a safe, clean, and friendly environment for visitors and businesses in general and an anchor for revitalization of the entire downtown area. This constitutes a public purpose under the United States and Nevada Constitutions." *Id.* at 19a.

The Court then turned to the related issue of blight. *Id.* at 19a-24a. Here again, the Court glossed over the trial court's specific findings concerning the absence of blight in 1986, when the Agency adopted the Plan, not only on the block that was condemned, but in the entire downtown area surveyed. Rather, the Court stated: "The record reflects no basis for any conclusion that economic, social or physical blight was eradicated between the date the Plan was adopted in 1988 and the date the Fremont Street Experience project was approved in 1993."[4] *Id.* at 24a. In fact, nothing in the record suggests that the Agency made specific findings of blight at the time it approved the Fremont Street Experience project in 1993.

If anything, the public record establishes the contrary to be true. At a City Council meeting at the end of December

---

4/ The City Council adopted the Plan on March 5, 1986, not in 1988, as the Court stated. Hence seven years (not five) had passed between the adoption of the Plan with the attendant public hearings and notice, and the taking of the Pappas Family's property.

1989, right in the middle of this seven year gap, Steve Wynn, the owner of one of the respondent LLC casinos, testified at length before the Agency, opposing a different condemnation plan, and forcefully disputing the notion that downtown Las Vegas was blighted: "We're talking about a hard core reality down here about business. The downtown isn't dying. Where did that idea get hot around here? The downtown doesn't need this kind of refurbishment with public money." (Gaughn Dep. Ex. B, Dec. 20, 1989 Agency Meeting Tr. at 26.) Another LLC casino owner who was present at that meeting, Jack Gaughn, later testified in a deposition in this case that he had agreed with Mr. Wynn that downtown Las Vegas was not blighted. (Gaughn Dep. at 45-47.)

Ultimately, the Nevada Supreme Court relied upon *Berman v. Parker*, 348 U.S. 26 (1954), to resolve the problem of the missing blight:

> Although the area in *Berman* involved slums and an urban renewal statute, rather than a community redevelopment statute, its rationale still applies. The specific building at issue in *Berman* was not itself blighted. The building was to be taken from a private owner and managed by a private agency. The Court concluded, however, that redevelopment encompasses an entire area, not just individually blighted sections. . . . Consistent with *Berman*, the fact that the Pappases' property itself was not blighted does not prohibit its taking through eminent domain proceedings.

Id. at 22a-23a.

Two justices dissented. *Id.* at 30a-41a. Justice Leavitt noted the absence of blight:

> The Pappases' property was not a slum. The City's survey gave no indication that the property was blighted in any way. There certainly were no conditions injurious to the public health, safety, morals and welfare. The property was adjacent to a savings and loan building and across the street from a bank.

Id. at 31a. Because "there was no evidence of blight in or around the Pappases' property; . . . the goal of eliminating blight, which in some cases may be a legitimate public use, is not applicable in this case." *Id.* at 32a.

Justice Maupin also dissented. Because the project "effected a material change to or deviation from the governing redevelopment plan," he concluded "that the Agency improperly failed to seek formal amendment of the Plan before taking properties as eminent domain." *Id.* at 34a. Further, the Pappas Family "should still have been able to lodge objections in the context of a formal plan amendment concerning the Fremont Street Experience project on the grounds that takings pursuant to the amendment would not serve to alleviate blight in the neighborhood," in other words, "were inconsistent with the goals of the original Plan, or were not effected for public use." *Id.* at 38a.

REASONS FOR GRANTING THE PETITION

This taking follows a pattern becoming an epidemic in this country that represents the very worst in abuses of the eminent domain power. *See, e.g., Mississippi Churning*, Editorial, Wall St. J., Jan. 4, 2002, at A12. In the name of "economic redevelopment," the local city council strips citizens and small businesses of valuable non-blighted properties that they have worked hard to purchase and maintain, on blocks never even surveyed for blight, in

neighborhoods not suffering blight, and then gives those properties to wealthy, politically-connected private businesses to tear down for parking lots or other private uses that will enhance their private profits. Here, those businesses › a cartel of casinos and purveyors of adult entertainment › selected the property and financed the project. And the trial court judge who stripped the Pappas Family of their property in an *ex parte* hearing was an investor in one of those casinos.[5]

Yet the Supreme Court of Nevada held that *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), required it to turn a blind eye to this blatant violation of the Pappas Family's fundamental federal constitutional right to own private property. Because "tourism and visitor volume continued to decline in downtown Las Vegas," Pet. App. 24a › in other words, because casinos with political clout were not making as much money as they wanted to make › the Supreme Court of Nevada believed that it had to permit the city council to take private properties from their rightful and responsible owners and give those properties to covetous neighbors. But neither *Berman* nor *Midkiff* permit, much less require, courts to stand silent when local units of government act to redistribute private property that is neither blighted nor essential to remedying adjacent blight.

If "blight" now encompasses a downturn in tourism as well as uninhabitable slums, and if the presence of blight

---

5/ The Institute for Justice included the taking of the Pappas Family's property in its report examining the abuse of eminent domain powers. *See* Dana Berliner, *Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain* 130-31 (2003).

somewhere in a city makes any property in the city ripe for "economic redevelopment" condemnation, then local governments can act as local tyrants, determining who may own property within their jurisdictions and who may not. But the Constitution, in particular the Fifth and Fourteenth Amendments, do not permit this kind of taking. This Court should issue the writ to turn this rising tide of tyranny by holding that courts must apply the "public use" limit of the Fifth and Fourteenth Amendments to bar the taking of private property that is neither blighted nor essential to remedying adjacent blight and the giving of that property to different private owners for the purpose of "economic redevelopment."

I. This Court Should Issue The Writ Of Certiorari Because The Nevada Supreme Court's Reading of *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* Violates The Public Use Protection Of The Fifth And Fourteenth Amendments.

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court reviewed Congress's legislative response to well-documented urban decay that left thousands living and dying in slums. In this case, the Nevada Supreme Court reviewed the Las Vegas city council's response to concerns that tourism was decreasing.

In *Berman*, the taking involved a tract of segregated Washington, D.C., in which conditions were documented to be intolerable: almost two-thirds of dwellings were "beyond repair"; well over half "had outside toilets"; and over 80%

"lacked central heating." *Id.* at 30.[6] The department store at issue in *Berman* sat in the midst of this squalor. *Id.* at 31. In this case, the taking involved a valuable block of successful, diverse commercial enterprises across one street from a casino owned by respondent LLC's members, and across other streets from banks and a savings and loan, and surrounded by many other blocks of valuable commercial properties. Any supposed blight was blocks, perhaps miles, away › and the properties between were *not* taken. Congress's urban renewal efforts at the heart of *Berman* were a far cry from the reverse-Robin Hood action of the city council here.

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), arises in a factual context quite distinct from that presented by this case. Relying on historical precedent from the Revolutionary War era, *Midkiff* upheld a statute designed to break-up a land monopoly system created by the monarchy that preceded American statehood so that American citizens could participate in the fundamental right of property ownership. *Id.* at 232, 241-42 & n 5. This case is exactly the reverse of *Midkiff*. Casino owners already own most of downtown Las Vegas, yet the Las Vegas city council passed a law to dispossess small property owners so that these oligopolistic (indeed, oligarchic) property owners could increase their property holdings in town.

6/ The district court opinion further reflects that the general death rate was 50% greater in this area than in the entire District of Columbia, with deaths from tuberculosis and syphilis occurring at an even greater rate in the afflicted area. *Schneider v. District of Columbia*, 117 F. Supp. 705, 709 (D.D.C. 1953).

Although *Berman* and *Midkiff* call for a "narrow" scope of judicial review, they do not eliminate judicial review entirely. Indeed, *Midkiff* specifically states: "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." 467 U.S. at 240. But the police power does not extend to taking valuable, non-blighted property that is surrounded by non-blighted property on the notion that a different owner could use the property in a different manner that might indirectly benefit the public by luring more tourists or employing more people or generating more taxes. This Court has never upheld such a taking.

The repercussions of reading *Berman* and *Midkiff* so broadly as to require reflexive judicial approval of this kind of taking cannot be overstated. It is the rare community that suffers no blight, much less no economic slowdown. But according to the Supreme Court of Nevada, the mere presence of either would empower the local city council to take anyone's property anywhere in town and give it to a more profitable business or a wealthier individual. This Court should issue the writ to clarify that the Fifth and Fourteenth Amendments do not permit such an unbridled exercise of eminent domain.

II. This Court Should Issue The Writ Of Certiorari To Resolve The Conflict Among The State Courts Engendered By *Berman v. Parker* And *Hawaii Housing Authority v. Midkiff*.

Berman and *Midkiff* are not always read so broadly. Courts in other states have disagreed with the overbroad interpretation of these cases adopted by the Supreme Court of

Nevada, and have prohibited very similar "economic redevelopment" takings after citing *Berman* and *Midkiff*. Furthermore, decisions on both sides of this issue often come with vigorous dissents. Such conflicts among state courts on federal issues merit this Court's review. *See, e.g., Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (noting "two dissents from the opinion of the Supreme Court of California" and "the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case").

In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002) ("*SWIDA*"), for example, the Illinois Supreme Court confronted a fact situation remarkably similar to that presented in this case. The Illinois General Assembly had created SWIDA to redevelop an economically depressed two-county region. *Id.* at 227-28. The Gateway racetrack › a big engine of tourist income and therefore a favored business › coveted property owned by its next door neighbor, NCE › a recycling plant › for a parking lot. *Id.* at 229. Gateway persuaded SWIDA to exercise its legislatively-bestowed quick-take power to seize that property and give it to the racetrack. *Id.* SWIDA incanted the mantra of blight and public safety, as the Agency did here, but there, as here, any blight was distant from the taking; the taking's real reason was to improve the tourist attraction's business and thereby indirectly to enhance economic redevelopment. *Id.* at 9. Citing *Berman* and *Midkiff* repeatedly, *see SWIDA* at 7, 8, 9, the Illinois Supreme Court rejected the rationale accepted by the Nevada Supreme Court that what is good for the big businesses in town is indirectly good for everyone else in town as well, and therefore qualifies as "public use":

> As a result of the acquisition of NCE's property, Gateway could realize an estimated increase of $13 to $14 million in projected revenue per year. While we do not deny that this expansion in revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government. Using the power of the government for purely private purposes to allow Gateway to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public.

Id. at 10-11.[7]

Similarly, in *Mayor v. Thomas*, 645 So. 2d 940, 941 (Miss. 1994), the Mississippi Supreme Court rejected a taking by the City of Vicksburg of property to be given to Harrah's for a casino as part of an urban renewal plan. Citing *Berman*, the City argued that this was a public use because Harrah's casino would result in "increased employment of the citizenry, attraction of tourists, upgrading City facilities by $500,000 received under the contract, over $15 million added to City tax rolls, and $60,000 for the construction of a park in the Urban Renewal Area." *Id.* at 942-43. Nevertheless, the Mississippi Supreme Court held that because "Harrah's is the primary beneficiary of the taking," this was not a public use. *Id.* at 943; *see also City of Center Line v. Chmelko*, 416 N.W.2d 401, 403-07 (Mich. Ct. App. 1987) (striking taking where City claimed that it sought to condemn property "for

---

7/ The dissenting opinion, however, criticized the majority's reading of *Berman* and *Midkiff*. 768 N.E.2d at 17.

commercial purposes in a manner that will improve the economic viability of the existing commercial district," when in fact it intended to convey condemned land to an auto dealership that wanted to expand its parking space).

This Court should issue the writ to resolve this conflict among the states and provide guidelines for applying the "public use" limitation to the "economic redevelopment" takings.

III. This Court Should Issue The Writ Of Certiorari To Reconsider *Berman v. Parker* And *Hawaii Housing Authority v. Midkiff* In Light Of *Dolan v. City of Tigard*, To Resurrect The "Public Use" Protection Of The Fifth And Fourteenth Amendments, And Thereby To Restore The Fundamental Constitutional Right To Own Property.

If *Berman* and *Midkiff* do permit the taking of one person's property for the sole purpose of giving it to another who can use it to attract more tourists or employ more people or pay more taxes, then this Court should issue the writ and modify or overrule those cases because the Constitution does not. This is the very antithesis of "public use."

There can be no doubt that property ownership free from arbitrary interference by the sovereign is among the most fundamental of our constitutional rights. In the century leading up to our war for independence from Great Britain and the adoption of our Constitution, John Locke's view of government, as having evolved to protect the natural right to private property ownership, predominated. *See, e.g.*, James W. Ely, Jr., *The Guardian Of Every Other Right: A Constitutional History of Property Rights* 16-17 (Kermit L. Hall ed., 2d ed. 1998) (hereafter "Ely"); Richard A. Epstein,

Takings: Private Property and the Power of Eminent Domain 29 (1985) (hereafter "Epstein"); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 365, 383-84 (1928). The signal importance of Britain's efforts to control taxes, trade, and property rights as a factor leading to the American Revolution is well known and indisputable. Ely at 26-29. As Arthur Lee of Virginia wrote, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (4th ed. 1775).

While rallying his troops before the Battle of Long Island, George Washington made the same point: "The time is now near at hand which must probably determine whether Americans are to be freemen or slaves; *whether they are to have any property they can call their own. . . .*" John Bartlett, *Familiar Quotations* 336 (Justin Kaplan ed., 16th ed. 1992).

Delegates to the Constitutional Convention in Philadelphia gave voice to the same view. For example, John Rutledge of South Carolina stated: "Property was certainly the principal object of Society." 1 *Records of the Federal Convention of 1787* 534 (Max Farrand ed., rev. ed. 1966). Founding Father Alexander Hamilton likewise wrote: "One great objt. of Govt. is personal protection and the security of Property." *Id.* at 302.

Similarly, in his *A Defense of the American Constitutions* (1787), our second President, John Adams, wrote:

> The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If "Thou shalt not "covet" and "Thou shall not steal" were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free.

John Adams, *A Defence of the Constitutions of Government of the United States of America* (1787-88), *reprinted in Democracy, Liberty, and Property* 126 (Francis W. Coker ed. 1942).

The framers of the Constitution sought to protect private property rights from future sovereigns. James Madison's Fifth Amendment would limit the new federal government to taking private property only "for public use" and then only with "just compensation." U.S. Const. amend. V. But the framers also were concerned with the conduct of the *states* towards private property rights: "To conservatives the experience of the revolutionary period demonstrated that the state governments could not be trusted to respect property rights. *A principal objective of the framers was to prevent the state legislatures from redistributing property.*" Ely at 44 (emphasis added). State constitutions at the time by and large having their own public use and just compensation limitations, *id.* at 30-31, the framers addressed their concerns at the time through the Contract Clause. *Id.* at 44-45.

After the Civil War and the adoption of the Fourteenth Amendment, however, the Takings Clause became the first provision of the Bill of Rights to be incorporated through the Fourteenth Amendment's due process clause and thus

applicable to the states. *See Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897); *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994). Significantly, in so ruling, this Court chose to highlight its earlier discussion, in *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U.S. 655, 663 (1874), of limits on "our governments, state and national." Specifically, the Court stated: "No court, [Mr. Justice Miller] said, would hesitate to adjudge void any statute declaring that 'the homestead now owned by A. should no longer be his, but should henceforth be the property of B.'" *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 237, *quoting Citizens' Savings & Loan Ass'n*, 87 U.S. (20 Wall.) at 663.

Well into the Twentieth Century, this Court considered "public use" to be an issue for the courts: "It is well-established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930).

But little more than 20 years later, *Berman* sharply curtailed the scope of judicial review to "an extremely narrow one." 348 U.S. at 32. The cases *Berman* cites in support of this proposition are wholly distinguishable. *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925), involved the taking of land on which the Government had constructed a costly military installation after the owner had refused to renew the Government's lease for the property it had improved. *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546 (1946), involved the taking of property incident to a TVA dam project. Neither case involved a challenge that the taking at issue was "a taking

from one businessman for the benefit of another businessman." 348 U.S. at 33. Even so, Justice Frankfurter wrote a concurring opinion in *Welch* noting his understanding that "the Court again recognizes the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence." 327 U.S. at 557-58.

Berman discusses the breadth of the police power at great length. 348 U.S. at 31-36. Yet it addresses the rights of property owners in but a single sentence: "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 36. This summary treatment has prompted more than one scholar to conclude that *Berman* and *Midkiff* wrote the words "public use" out of the Fifth Amendment: "The Supreme Court, for all practical purposes, has eliminated the 'public use' requirement as a check on the power of government to appropriate private property by means of eminent domain." Ely at 148 (citing *Berman*); Epstein at 161 (*Berman* dealt the public use limitation a "mortal blow"); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 61 (1986) ("most observers today think the public use limitation is a dead letter"); Donald J. Kochan, "*Public Use*" *and the Independent Judiciary*: *Condemnation in an Interest Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 74 (1998) (hereafter "Kochan") (the public use limitation is a "meaningless standard of review"). The Nevada Supreme Court gave *Berman* and *Midkiff* just such an overbroad reading.

But the framers did include a "public use" requirement in the Fifth Amendment. And this Court should read the Constitution to give effect to express language of the framers,

particularly in the Bill of Rights. "As men whose intentions require no concealment, generally employ words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

Moreover, the framers provided the means for eliminating provisions from the Constitution, *i.e.*, the amendment power. U.S. Const. art. V. No amendment has removed the "public use" limitation from the Fifth Amendment. This Court should therefore give effect to this limitation in the context of these abusive economic redevelopment takings.

Takings for "economic redevelopment" demonstrate why the "just compensation" limitation alone offers insufficient protection for the constitutional right to own property. Economic redevelopment takings often (as here) target valuable non-blighted property. Indeed, the private businesses that will get the taken properties often select or participate in selecting the properties to be taken, and then fund, either entirely or in part, the taking. (Pet. App. 55a; *see also SWIDA*, 768 N.E.2d at 4-5, 10.) These businesses are more than happy to fund these takings because they get a better price through the government at a just compensation hearing than they would in the open market. *See* Kochan at 53. After all, a jury is setting the price rather than the property's rightful owner, and the jury is told that the price will be paid by a unit of local government (most likely one that the jurors are supporting themselves through their tax payments).

As the history of our Revolution and of our Constitution amply establishes, the right to own private property is a fundamental constitutional right. But *Berman* and *Midkiff* are inconsistent with the treatment this Court affords other fundamental constitutional rights incorporated through the Fourteenth Amendment. *E.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (content-based speech regulations are subject to strict scrutiny); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (non-general law burdening religious practice is subject to strict scrutiny). This Court would not abide a local legislative judgment that all members of one race or one religion should live together. *E.g.*, *Adarant Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all racial classifications . . . must be analyzed . . . under strict scrutiny").

Our constitution does not create a set of second-class rights for property ownership. As this Court said recently in *Dolan*, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation. . . ." 512 U.S. at 392. Indeed, there is good reason why property rights are so fundamental:

> The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972), *citing* J. Locke, *Of Civil Government* 82-85 (1924); J. Adams, *A Defence of the Constitutions of Government of the United States of America*, in F. Coker, *Democracy, Liberty, and Property* 121-132 (1942); 1 W. Blackstone, *Commentaries* *138-140.

Nothing suggests that when determining whether a "deprivation" of property › as opposed to speech or travel › is "unlawful," *Lynch*, 405 U.S. at 552, courts must yield entirely to the legislatures. Yet the Supreme Court of Nevada reads *Berman* to say that the courts must bow to a legislative judgment that the private property of one citizen may be taken from her and, in the name of "economic redevelopment," given to her neighbor because that neighbor can put it to more profitable use: "the United States Supreme Court has concluded that when a legislative body decides that a need for redevelopment serves the public, its decision is 'well-nigh conclusive.'" Pet. App. 2a., *quoting Berman*, 348 U.S. at 32.

This is not a judicial standard; it is judicial abdication. *Courts* are the instrumentalities through which the government takes property. But courts are sworn to uphold the Constitution; they cannot be required to carry out unconstitutional legislation reflexively. "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, *is none the less a robbery because it is done under*

the forms of law . . . ." Citizens' Savings & Loan Ass'n, 87 U.S. (20 Wall.) at 664 (emphasis added).[8]

Courts should not be complicit in such robbery › rather they should be "an impenetrable bulwark against every assumption of power in the Legislative or Executive; . . . to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." *Davis v. Passman*, 442 U.S. 228, 241-42 (1979), *quoting* James Madison, *reproduced in* 1 *Annals of Cong.* 439 (1789).

The "rationally related" test that *Midkiff* takes from *Berman*, *see* 467 U.S. at 241, leaves courts ill-prepared to serve as that bulwark against local governments redistributing private property rights in the name of "economic redevelopment." Indeed, in *Dolan* this Court rejected the "reasonable relationship" test for exactions, "partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." 512 U.S. at 391. If heightened scrutiny is required where a local authority "would deprive [a landowner] of the right to exclude others, 'one of the most essential sticks in the bundle

---

8/ The Court in *Citizens' Savings & Loan Ass'n* addressed a tax, not a taking. But by its very nature an improper taking is more insidious than an improper tax. Taxes address classes of people, which by dint of their size have at least a chance to roll back the offending legislation through exercise of the franchise. Takings typically address individuals or very small groups who are far less likely to have electoral strength. Further, new owners of property typically alter the property promptly upon receiving it (as happened here), making the undoing of a taking far more difficult. Moreover, taking a person's property may even drive her out of the electoral district. Therefore, what *Citizens' Savings & Loan Ass'n* said of improper taxes is even more accurate for improper takings.

of rights that are commonly characterized as property,'" *id.* at 384, quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (emphasis removed), it surely must be required where the local city counsel grabs the entire bundle, and then passes it to another private owner.[9] This Court should issue the writ and address how courts should scrutinize takings under the Fifth Amendment "public use" protection to limit abusive "economic redevelopment" takings like this one.

CONCLUSION

"A government . . . which held the lives, the liberty, and *the property* of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." *Citizens' Savings & Loan Ass'n*, 87 U.S. (20 Wall.) at 662 (emphasis added). Taking property from a private citizen to promote the economic redevelopment of a community may sound good, but it is an evil › and all the more insidious because it seems that so many people will benefit from just one person's loss. The problem is that not just one person loses › *everyone loses* because everyone's ownership rights are diminished. This concept, in fact, has been tried elsewhere in the world and has failed abysmally: "the theory of the Communists may be summed up in the single sentence: abolition of private property." Karl Marx & Friedrich Engels, *The Communist Manifesto* (1848),

---

9/ Although this Court declined to extend the *Dolan* test from exactions to denials of development in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999), this 'exaction' of the Pappas Family's property *in toto* fits more closely with *Dolan* than *Del Monte Dunes*.

reprinted in 50 Great Books of the Western World 425 (Robert Maynard Hutchins ed. 1952).

As 1974 Nobel Laureate Friedrich A. Hayek wrote in *The Road To Serfdom* 103-04 (1944), "What our generation has forgotten is that the system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not."

Berman and *Midkiff* do not expressly approve of "economic redevelopment" takings. But the Supreme Court of Nevada read those cases as requiring it to defer to the city council despite the detailed findings of the trial court below concerning the absence of any blight in the area. Other state courts have not read *Berman* and *Midkiff* so broadly, thus creating a conflict that this Court should resolve › by concluding that these cases do not, or may not, permit such unconstitutional takings to proceed.

Writing in support of the ratification of the Constitution, James Madison, who authored the Fifth Amendment, states that "[g]overnment is instituted no less for protection of the property than of the persons or individuals." *The Federalist* No. 54, at 333 (James Madison) (Isaac Kramnick ed., 1987).

The Pappas Family respectfully requests this Court to grant their petition for writ of certiorari and to provide the "protection of the property," as Madison and the framers intended.

Barry Levenstam
Counsel of Record
Jeremy M. Taylor
John W. Joyce
Melinda E.A. Cupps
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

January 6, 2004

APPENDICES

Appendix A

Supreme Court of Nevada.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY; Fremont Street Experience Limited Liability Company, and Fremont Street Experience Parking Corp., Appellants/Cross-Respondents,
v.
Carol PAPPAS; John H. Pappas, Jr.; and Harry J. Pappas, Respondents/Cross-Appellants.

No. 39255.

Sept. 8, 2003.

Before the Court En Banc.[1]

OPINION

By the Court, BECKER, J.:

This is an appeal from a district court order granting respondents' motion to dismiss in an eminent domain action and a cross-appeal from a district court order dismissing respondents' counterclaims in the same action.[2] Appellants/cross-respondents, the City of Las Vegas Downtown Redevelopment Agency (Agency), Fremont Street Experience Limited Liability Company, and Fremont Street

---

[1]The Honorable Mark Gibbons, Justice, voluntarily recused himself from participation in the decision of this matter.

[2]Judge Chairez dismissed the eminent domain action; Judge Huffaker and Judge Mark Denton dismissed the counterclaims.

Experience Parking Corp. (collectively Fremont Street Experience), argue the district court erred in entering an order dismissing the Agency's eminent domain complaint. Respondents/cross-appellants Carol Pappas, John H. Pappas, Jr., and Harry J. Pappas (collectively the Pappases) contend that the district court erred in entering an order dismissing their counterclaims. We conclude the district court erred in dismissing the eminent domain complaint and those portions of the counterclaims that seek damages for alleged pre-condemnation interference with the Pappases' tenants. We further conclude that the district court did not err in dismissing the remaining counterclaims.

Both the United States and Nevada Constitutions allow the taking of private property for public use provided just compensation is paid to the private property owner.[3] The Nevada Legislature has clearly defined economic redevelopment as a public purpose.[4] And, the United States Supreme Court has concluded that when a legislative body decides that a need for redevelopment serves the public, its decision is "well-nigh conclusive."[5] There is no exception to the rule "because the power of eminent domain is involved."[6] When substantial evidence supports an agency's determination that a specific project furthers economic redevelopment under NRS Chapter 279, the project is for a public purpose. The sole remaining issue for a jury to determine is just compensation. We conclude that in this case, substantial evidence supports the Agency's determination that the project in issue facilitates

---

[3]*See U.S. Const. amend. V*; Nev. Const. art. 1, § 8, cl. 6.

[4]NRS 37.010(17).

[5]*Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

[6]*Id.*

redevelopment. Thus, we conclude that the Agency's use of eminent domain was constitutionally permissible and the district court therefore erred in dismissing the Agency's eminent domain complaint.

FACTS

On November 6, 1985, the Las Vegas City Council (Council) created the Agency to tackle redevelopment issues under NRS Chapter 279.[7] The Agency's board is comprised solely of Council members.

NRS Chapter 279 identifies redevelopment to eliminate blight as a public purpose. The Council identified various sections of the city, including the area commonly known as downtown Las Vegas, for the Agency to evaluate and determine whether redevelopment was necessary to combat physical, social, or economic blight. The downtown section identified included property owned by the Pappases. The Agency directed its staff and the City's Planning Commission to evaluate the identified area and prepare a report on any conditions showing physical, social, and economic blight in the area. The ensuing report identified various physical, economic, and social conditions within the area constituting "blight" within the definition set forth in NRS 279.388.[8] These conditions included increased

---

[7]NRS 279.428 states, "An agency shall not transact any business or exercise any powers under NRS 279.382 to 279.685, inclusive, unless, by resolution, the legislative body declares that there is need for an agency to function in the community."

[8]NRS 279.388 provides:

"Blighted area" means an area which is characterized by one or more of the following factors:

crime rates and requests for police assistance, business flight

---

1. The existence of buildings and structures, used or intended to be used for residential, commercial, industrial or other purposes, or any combination thereof, which are unfit or unsafe for those purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime because of one or more of the following factors:

(a) Defective design and character of physical construction.
(b) Faulty arrangement of the interior and spacing of buildings.
(c) Overcrowding.
(d) Inadequate provision for ventilation, light, sanitation, open spaces and recreational facilities.
(e) Age, obsolescence, deterioration, dilapidation, mixed character or shifting of uses.

2. An economic dislocation, deterioration or disuse, resulting from faulty planning.

3. The subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.

4. The laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions.

5. The existence of inadequate streets, open spaces and utilities.

6. The existence of lots or other areas which may be submerged.

7. Prevalence of depreciated values, impaired investments and social and economic maladjustment to such an extent that the capacity to pay taxes is reduced and tax receipts are inadequate for the cost of public services rendered.

8. A growing or total lack of proper utilization of some parts of the area, resulting in a stagnant and unproductive condition of land which is potentially useful and valuable for contributing to the public health, safety and welfare.

9. A loss of population and a reduction of proper use of some parts of the area, resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere.

The Legislature adopted this provision in 1959. *See* 1959 Nev. Stat., ch. 418, § 7, at 648-49. It has been amended only once, in 1985. *See* 1985 Nev. Stat., ch. 639, § 11, at 2068-69.

from the downtown area, decline in tourism, lack of parking, visitor and residents' perceptions of lack of safety in the area, and increases in vacant and aging buildings.

Based upon this evidence, the Planning Commission submitted a redevelopment plan (Plan) to the Agency. The Agency accepted the proposed Plan, reviewed the information submitted to the Planning Commission, and decided to consider adopting the Plan. Pursuant to statute, the Agency then provided notice of a public hearing to landowners affected by the proposed Plan. At the hearing, members of the public acknowledged that significant problems existed in the downtown area. Some individuals disagreed, however, with the adoption of a redevelopment plan. Instead, they urged the Agency to work with individual landowners and businesses, and to provide money for renovations, promotions, and other methods for cleaning up and bringing people back to the downtown area.

After considering the public comments, the Agency approved the Plan. The Agency determined that blight was causing a serious physical, social, and economic burden on the City in all applicable downtown areas. The Agency concluded that working with individuals on a piecemeal basis would not stem the decline of the downtown area. The Agency also concluded that neither the City, nor the private sector, acting alone, had the resources to accomplish the redevelopment goal. The Agency found that only the combined redevelopment efforts of the City and the private sector would improve the area.

The Plan provided a framework for all future redevelopment. It was intentionally general; it included no specific projects. The purpose, however, was to eliminate physical, social, and economic blight and to encourage businesses and individuals

to return to a safe downtown area with adequate parking and facilities. The Plan provided business and property owners in the area an opportunity to propose and participate in projects that would eliminate physical, social, and economic blight as well as mechanisms for encouraging investors to develop new projects in the area. The Agency could also use its power of eminent domain to acquire private property for projects designed to eliminate social and economic blight.

Neither the Pappases nor any other person challenged the Plan within the ninety-day period following its adoption, as required by statute.[9] The Plan created a conclusive presumption that the area encompassing the Pappases' property was blighted under the Community Redevelopment Law.[10]

Several years passed between the adoption of the Plan and the events that led to the present action. Over that period, the Agency approved several projects. Some succeeded and some did not. The downtown area continued to lose ground. Finally, to accomplish redevelopment and eliminate physical, social, and economic blight in the core downtown area, the Agency considered various proposals for an anchor project. The Agency sought a concept that would be a feature attraction in downtown Las Vegas. The ideal project would create a safer, cleaner environment designed to draw visitors and businesses back to the downtown area. This increase in activity would then encourage additional businesses to relocate to areas outside of, but adjacent to the core. As businesses returned,

---

[9]NRS 279.609 states in part, "Any action questioning the validity of . . . [t]he adoption or approval of that plan . . . may only be brought after the adoption of the plan . . . or within 90 days after the date of adoption of the ordinance adopting . . . the plan."

[10]*See* NRS 279.589.

improvement of residential areas would follow. Thus, in conjunction with the feature attraction, the City also considered creating new business or shopping venues in the area.

Eventually, the concept known as the Fremont Street Experience surfaced as the anchor project to accomplish the Agency's redevelopment goals. Several components comprised the Fremont Street Experience, including a sculpted steel mesh canopy stretching across Fremont Street from Main to Fourth Streets. The canopy would allow light and air flow during daylight hours but would provide shade for tourists. At night, however, the Fremont Street Experience would present a sound and light show. In addition, the Fremont Street Experience would create a pedestrian plaza by closing Fremont Street to vehicular traffic from Main Street to Las Vegas Boulevard. Finally, because of a lack of adequate public parking, plans for the Fremont Street Experience included a five-story public parking structure with some retail and office space.

Because the Agency lacked the financial resources to construct the project alone, it entered into an agreement with a consortium of downtown casinos. The consortium would finance and cover any operating losses of the feature attraction as well as the construction of the parking garage. The City would authorize the creation of the pedestrian mall, and the Agency would provide funds to acquire the land needed to construct the garage. In return for the risk taken by the consortium in absorbing all of the construction costs, start- up losses, and possible operating losses, the consortium would control the operation and revenues of the garage as well as the operation of the feature attraction. The Council approved the Fremont Street Experience project in Bill No. 93-55.

Under the project's plans, the parking garage would occupy an

entire city block. The chosen block was composed of thirty-two individual parcels in multiple ownerships. The Pappases owned three of these parcels, composing a small portion of the block. The Agency sent the Pappases an offer to purchase their property. The Pappases refused but indicated their willingness to enter into a ground lease with the Agency. Although the Agency initially indicated its willingness to enter into a ground lease, it determined that a ground lease was not feasible, as financing for the garage would not permit such an arrangement. The Agency therefore rejected this proposal and adopted a resolution to acquire the Pappases' land, if necessary, by eminent domain.

After further negotiations to purchase failed, on November 19, 1993, the Agency filed the eminent domain complaint to acquire the Pappases' property. The Agency moved for immediate occupancy pending entry of judgment. The Pappases failed to oppose the motion, which the district court granted. The Agency gained possession of the Pappases' land effective January 15, 1994.

The Pappases filed an answer and counterclaim, alleging six causes of action: (1) the Agency violated the Pappases' procedural due process rights in its initial motion for occupancy, (2) the Agency improperly took the Pappases' property through inverse condemnation by its initial motion for occupancy, (3) the Agency encouraged the Pappases' tenants to vacate and not pay rent because of the impending condemnation, (4) the Agency engaged in intentional interference with business opportunities, (5) the Agency violated the Pappases' substantive due process rights by failing to adequately compensate them for the taking, and (6) the Agency failed to allow the Pappases to participate in the redevelopment project as statutorily required.

The Pappases then filed a motion for rehearing regarding the Agency's immediate occupancy. The district court denied the motion. The Agency took possession of the property, began demolishing the existing building, and commenced construction of the parking garage.[11]

Thereafter, the Agency filed a summary judgment motion on all of the Pappases' counterclaims. The district court found no genuine issue of material fact as to the first five counterclaims, noting that they were subsumed within the original eminent domain complaint, and the counterclaims for monetary damages could be pursued as a part of the just compensation in the eminent domain action. The district court denied the summary judgment motion regarding the Pappases' right of participation in the redevelopment project. The Pappases appealed the dismissal of their counterclaims, but because the district court's decision was not a final judgment resolving all of the claims between the parties, this court dismissed the appeal for lack of jurisdiction.

Over three years after the district court had granted the motion for occupancy and the garage had been constructed, the Pappases filed a motion to dismiss the Agency's eminent domain complaint.[12] The Pappases alleged the following: (1) the exercise of the power of eminent domain was without legal justification because the redevelopment plan was fatally

---

[11]We note that the appropriate vehicle for challenging an order granting a motion for immediate occupancy is a petition for writ relief, as an appeal of this interlocutory order is unavailable under NRAP 3A(b).

[12]The motion was also filed shortly before a trial was to begin on the value of the Pappases' property. The appraiser for the City valued the property at approximately $500,000, while the Pappases' appraiser valued the property at $1,400,000. The Pappases disagreed with their own appraiser and believed their property was worth $7,000,000.

deficient, (2) the district court lacked jurisdiction because the Agency improperly invoked the power of eminent domain, (3) the Agency negotiated with the Pappases in bad faith, and (4) the Agency violated the Pappases' procedural due process rights by violating the Nevada Rules of Civil Procedure. Shortly thereafter, Fremont Street Experience moved, and was granted permission to intervene in the pending litigation.

In their motion to dismiss, the Pappases attached minutes from the City Council meetings regarding the Fremont Street Experience, the Fremont Street Experience agreement, and various other affidavits and records regarding the project. In addition, the district court ordered the Agency to prepare a record of the administrative proceedings that led to the eminent domain complaint. Thus, the motion to dismiss was converted into one for summary judgment.

After considering the evidence and conducting a hearing, the district court dismissed the Agency's complaint. The district court concluded: (1) the construction of the garage did not preclude the Pappases from contesting the project's public purpose; (2) the ninety-day statute of limitations in NRS 279.609 did not preclude judicial review of the taking; (3) the Agency lacked authority to condemn the property because it failed to amend the redevelopment plan, and the district court lacked jurisdiction to hear the Agency's eminent domain complaint; (4) the Agency lacked authority to use eminent domain because there were other less restrictive means to obtain the property; (5) the Agency acted in bad faith regarding owner participation in the project; (6) despite finding redevelopment a statutorily valid public use, the Agency's taking of the Pappases' property was not a public use because of the above statutory violations; and (7) the Agency failed to act in good faith regarding negotiations for the property. The

district court eventually dismissed the one remaining counterclaim, finalizing the judgment by resolving all of the pending claims. This appeal and cross-appeal followed.

DISCUSSION

The district court's findings in support of dismissing the eminent domain complaint encompass four primary issues: (1) whether the Pappases are procedurally barred from challenging the legality of the eminent domain proceedings based on the doctrines of estoppel or waiver, (2) whether the taking constitutes a "public use" under the Nevada and Federal Constitutions, (3) whether the Project furthers the purpose of eliminating blight under the community redevelopment statutes, and (4) whether the taking was necessary to further a public use.[13]

Estoppel/waiver

Appellants contend that the district court erred in permitting the Pappases to challenge whether the parking structure constituted a public use and the necessity of the taking three years after the motion for occupancy was granted. Appellants argue that the Pappases should have opposed the original motion for occupancy or asserted such issues in their motion for reconsideration. Moreover, appellants allege that the Pappases should have sought an extraordinary writ in this court directing the district court to vacate its orders granting the motion for

---

[13]The district court's remaining findings in support of the dismissal deal with challenges to the scope of the Plan and the need to amend the Plan whenever a particular project is undertaken. We recently rejected similar challenges in *Las Vegas Downtown Redevelopment v. Crockett,* 117 Nev. 816, 34 P.3d 553 (2001).

occupancy and denying the motion for reconsideration. We agree that issues regarding whether the proposed taking constitutes a "public use" under the Nevada and Federal Constitutions and whether the taking is necessary to accomplish that public purpose are issues to be addressed at the early stages of an eminent domain proceeding. Such issues need to be resolved before the existing property is substantially altered.

However, we have never held that a party seeking dismissal of an eminent domain complaint based on lack of public use or necessity grounds must raise the issues in opposition to a motion for occupancy or in a motion to dismiss filed before the subject property is significantly altered. Nor have we indicated that the failure to file a petition for extraordinary relief from an order granting a motion for occupancy or denying a motion to dismiss implicates the doctrines of waiver or estoppel. Therefore, we decline to apply these doctrines to the facts of this case. However, for all eminent domain cases filed after the date of this opinion, such challenges must be raised prior to occupancy and material demolition, alteration or construction on the subject property. Failure to timely assert lack of public use or necessity will constitute a waiver of these issues.

Public use

The United States Constitution declares that no private property shall "be taken for public use, without just compensation."[14] The Constitution of the State of Nevada similarly provides that "[p]rivate property shall not be taken for public use without just compensation having been first made." [15]

---

[14]U.S. Const. amend. V.

[15]Nev. Const. art. 1, § 8, cl. 6.

As the Illinois Court of Appeals eloquently acknowledged, "What constitutes a 'public purpose' . . . has plagued the American judiciary ever since it arrogated to itself the [prerogative] of interpreting constitutions."[16] A narrow interpretation requires actual use by the public.[17] A broad interpretation includes any "use [that] concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[18]

When construing the Federal Constitution, the United States Supreme Court broadly interprets the term "public use" and has rejected the concept that the Constitution requires actual use of the condemned property by the public.[19] Historically, this court has also broadly interpreted "public use" to include public utility, benefit, and advantage.[20] In fact, the majority of courts that have considered this issue, under state constitutions with language similar to Nevada's, have adopted broad interpretations of "public use."[21]

---

[16]*Lake Louise Imp. v. Multimedia Cablevision,* 157 Ill. App. 3d 713, 109 Ill. Dec. 914, 510 N.E.2d 982, 984 (1987).

[17]*See Thornton Development Authority v. Upah,* 640 F. Supp. 1071, 1077 (D. Colo.1986) (actual use like parks or streets).

[18]*Southern California Edison Co. v. Rice,* 685 F.2d 354, 356 (9th Cir. 1982) (quoting *City of Oakland v. Oakland Raiders,* 32 Cal.3d 60, 183 Cal. Rptr. 673, 646 P.2d 835, 841 (1982) (quoting *Bauer v. County of Ventura,* 45 Cal. 2d 276, 289 P.2d 1, 6 (1955))).

[19]*Rindge Co. v. Los Angeles,* 262 U.S. 700, 707, 43 S. Ct. 689, 67 L. Ed. 1186 (1923); *Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 159-62, 17 S. Ct. 56, 41 L. Ed. 369 (1896).

[20]*Dayton Mining Co. v. Seawell,* 11 Nev. 394, 408 (1876); *see also Milchem Inc. v. District Court,* 84 Nev. 541, 548, 445 P.2d 148, 152 (1968).

[21]2A Julius L. Sackman, *Nichols on Eminent Domain* §§ 7.01[1], 7.02[3] (rev.3d ed.2003).

Appellants contend that the district court used too narrow an interpretation in finding that accomplishing redevelopment through the construction of the parking garage was not a public use subject to the exercise of eminent domain. The Pappases claim that the garage is not a proper public use, even under the broader definition of public use, because the garage will be owned and operated by a private entity. The Pappases assert that whenever eminent domain involves the transfer of land from one private individual to another private individual, such a transfer is not for a public purpose.

The United States Supreme Court has soundly rejected the notion that transfer of land ownership from one private individual to another automatically falls outside the power of eminent domain. In *Hawaii Housing Authority v. Midkiff*,[22] the High Court considered this issue in the context of a Hawaii statute designed to diversify land ownership in Hawaii. The Hawaii Legislature enacted the Land Reform Act of 1967(Act) to break up a land oligopoly that had been in existence for hundreds of years.[23] To accomplish this goal, the Act allowed certain land to be condemned and then transferred from the landowner to other individuals who had previously leased the land from the landowner.[24] Under the Act, taking private property from the oligopoly of landowners and distributing the land to existing tenants was deemed to be a public purpose.[25]

The *Midkiff* Court held that "deference to the legislature's 'public use' determination is required 'until it is shown to

---

[22]467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).

[23]*Id.* at 232-33, 104 S. Ct. 2321.

[24]*Id.* at 233, 104 S. Ct. 2321.

[25]*Id.* at 233-34, 104 S. Ct. 2321.

involve an impossibility.'"[26] Continuing, the Court pointed out that it would "not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[27]

The Court held that controlling the oligopoly was a reasonable exercise of Hawaii's police power.[28] Although the Court recognized that the Act might not correct the problem, it concluded that "'the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective.'"[29] In this respect, the Court observed that the courts are not the place for "empirical debates over the wisdom of takings."[30] Accordingly, "if a legislature . . . determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."[31]

We have also rejected the concept that public ownership of the condemned property is essential to public use. In *Urban Renewal Agency v. Iacometti,*[32] we indicated that "[p]oscesory use by the public is not an indispensable prerequisite to the

---

[26]*Id.* at 240, 104 S. Ct. 2321 (quoting *Old Dominion Land Co. v. United States,* 269 U.S. 55, 66, 46 S. Ct. 39, 70 L. Ed. 162 (1925)).

[27]*Id.* at 241, 104 S. Ct. 2321 (quoting *United States v. Gettysburg Electric Ry.*, 160 U.S. 668, 680, 16 S. Ct. 427, 40 L. Ed. 576 (1896)).

[28]*Id.* at 242, 104 S. Ct. 2321.

[29]*Id.* (quoting *Western & Southern L.I. Co. v. Bd. of Equalization,* 451 U.S. 648, 671-72, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981) (alteration in original)).

[30]*Id.* at 243, 104 S. Ct. 2321.

[31]*Id.* at 244, 104 S. Ct. 2321.

[32]79 Nev. 113, 379 P.2d 466 (1963).

lawful exercise of the power of eminent domain."[33] We further explained that "[t]he rights of the [property owners] will be constitutionally satisfied when they receive just compensation for their properties."[34]

The Nevada Legislature, by enacting the Community Redevelopment Law, has declared that physical, social, and economic blight constitute "a serious and growing menace which is condemned as injurious and inimical to the public health, safety and welfare of the people."[35] Further, the Legislature has specifically found that blight decreases property values[36] and increases crime, which necessarily causes a disproportionate allocation of public services such as police, fire and accident protection in blighted areas.[37] The Legislature has declared that a community can exercise the power of eminent domain "whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone."[38] More importantly, NRS 279.424(3) specifically provides that "the redevelopment of blighted areas and the provision for appropriate continuing land use . . . constitute public uses and purposes . . . and are governmental functions of state concern in the interests of health, safety and welfare of the people."

Thus, so long as a redevelopment plan, or any individual redevelopment project, bears a rational relationship to the eradication of physical, social or economic blight, it serves a

---

[33]*Id.* at 126, 379 P.2d at 472-73.

[34]*Id.* at 127, 379 P.2d at 473.

[35]NRS 279.418(1).

[36]NRS 279.420.

[37]NRS 279.418(3).

[38]NRS 279.424(2).

public purpose within the power of eminent domain. The focus of the inquiry is whether the plan or project serves the public purpose, not whether the condemned property is eventually owned by a public or private entity.

In this case, there is a rational relationship that justifies the exercise of the power of eminent domain. The determination that the project would serve a public use is not "'palpably without reasonable foundation.'"[39] To the contrary, the record indicates the Agency's purpose for entering into a redevelopment agreement with Fremont Street Experience was to construct a safe entertainment street mall to attract visitors and businesses back to the downtown area. The garage was planned to ensure that adequate off-street public parking would be available for patrons of the downtown businesses. The entire project was designed to encourage additional revitalization projects spreading out from the central core of the downtown area. Thus, the project's central focus was to combat economic, social, and physical blight, a public purpose as defined by the Legislature.

It is this feature that distinguishes the anchor attraction and garage from cases where courts have dismissed eminent domain complaints because the taking was not for a public use.[40] In those cases, the courts found that eminent domain

---

[39]*Midkiff*, 467 U.S. at 241, 104 S. Ct. 2321 (quoting *Gettysburg Electric Ry.*, 160 U.S. at 680, 16 S. Ct. 427).

[40]*Cf. Armendariz v. Penman*, 75 F.3d 1311, 1320-21 (9th Cir. 1996); *99 Cents Only Stores v. Lancaster Redevelopment*, 237 F. Supp.2d 1123, 1128-31 (C.D. Cal. 2001); *Wilmington Pkg. Auth. v. Land W/Improvements*, 521 A.2d 227 (Del. 1986); *Southwestern Ill. Development Auth. v. NCE*, 304 Ill. App. 3d 542, 238 Ill. Dec. 99, 710 N.E.2d 896 (1999), *aff'd*, 199 Ill. 2d 225, 263 Ill. Dec. 241, 768 N.E.2d 1, *cert. denied*, 537 U.S. 880, 123 S. Ct. 88, 154 L. Ed. 2d 135 (2002).

proceedings were not instituted to accomplish a public purpose, such as the elimination of blight. Rather, the courts indicated that the sole purpose for acquiring the property through condemnation proceedings was to benefit another private entity.[41] Although, in these cases, the property to be condemned in each case was located in an area designated for redevelopment, the individual projects did not further redevelopment goals. Instead, the projects were simply expansions of existing business concerns. The businesses needed more parking or larger retail space and they wanted to acquire their neighbors' land to accomplish those purposes. When the neighbors did not agree, the businesses sought to use the redevelopment acts and eminent domain to acquire the property.[42] The courts found a lack of substantial evidence to support the government's assertion that the project expansions were designed to combat physical, economic or social blight. There was no evidence that the areas in question suffered from high crime, unemployment, vacant business or other components of blight that would be addressed by the proposed projects.[43] In contrast, when a project is intended to attack blight, such as creating a significant increase in jobs in an area suffering from high unemployment, even the relocation of one business through condemnation to make way for a new

---

[41] *99 Cents Only Stores*, 237 F. Supp. 2d at 1129-31 (eminent domain cannot be used solely to permit expansion of large retail store at expense of small retail business); *Wilmington Parking Auth.*, 521 A.2d at 234-35 (eminent domain improper where sole purpose was to permit newspaper to expand physical plant); *Southwestern Ill. Development Auth.*, 238 Ill. Dec. 99, 710 N.E.2d at 904 (no public purpose found where sole reason for eminent domain was expansion of raceway parking facilities).

[42] *See* cases cited *supra* note 41.

[43] *See* cases cited *supra* note 41.

business is still considered a public purpose.[44]

The creation of a public pedestrian mall and entertainment attraction is not the expansion of a business entity. The record reflects that the garage was not built to service a single business, but to address inadequate public parking in the downtown area and the need for new parking as visitor volume increased in response to the attraction. Although the attraction benefits the casino consortium that was willing to finance the project, its focus is to provide a safe, clean, and friendly environment for visitors and businesses in general and an anchor for revitalization of the entire downtown area. This constitutes a public purpose under the United States and Nevada Constitutions.

Blight

The district court found that substantial evidence did not support the Agency's finding that the area in which the Pappases' property was located was blighted; therefore, the inclusion of this area in the redevelopment plan was improper and the property was not subject to eminent domain proceedings. Appellants contend that the district court lacked authority to consider this issue because all challenges to a redevelopment plan must be brought within ninety days of the plan's adoption.

"Blight" is a term used to describe physical, social or economic

---

[44]*Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455, 458-59 (1981) (taking of property to facilitate construction of automobile plant permitted where area suffered from severe economic conditions and new industrial development was necessary to combat social and economic blight resulting from high unemployment).

conditions that affect the health, safety or welfare of a community.[45] There is no question that blight takes on many forms. Physical blight refers to a community's infrastructure, such as poorly designed streets, inadequate public facilities, building code violations, and substandard housing.[46] Slums are a common example of physical blight. Social blight incorporates such aspects as high crime or unemployment rates.[47] Economic blight involves downward trends in the business community, relocation of existing business outside of the community, business failures, and loss of sales or visitor volumes.[48]

For an area to be included in a redevelopment plan, there must be a finding that the general area suffers from some form of blight and that redevelopment is necessary to eliminate that blight.[49] If an agency's finding of blight is supported by substantial evidence, it is not subject to judicial review.[50] Substantial evidence is that which a "reasonable mind might accept as adequate to support a conclusion."[51]

---

[45]*Berman*, 348 U.S. at 31, 75 S. Ct. 98; *Sweetwater Valley Civic Ass'n v. National City*, 18 Cal.3d 270, 133 Cal. Rptr. 859, 555 P.2d 1099, 1103 (1976).

[46]*Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App.4th 388, 95 Cal. Rptr.2d 265, 270-71 (2000).

[47]*Id.* at 271.

[48]*Id.*

[49]*Sweetwater Valley Civic Ass'n*, 133 Cal. Rptr. 859, 555 P.2d at 1103.

[50]*In re Bunker Hill Urban Renewal Project 1B*, 61 Cal. 2d 21, 37 Cal. Rptr. 74, 389 P.2d 538 (1964).

[51]*State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (internal quotation marks and citation omitted).

In addition, judicial review of a redevelopment plan must be conducted within the timelines required by statute. NRS 279.609 provides that any challenge to the validity of a redevelopment plan must be raised within ninety days after the "adoption of the ordinance adopting . . . the plan." NRS 279.589(1) reinforces the finality of NRS 279.609, stating, "The decision of the legislative body concerning a redevelopment area is final and conclusive, and it is thereafter conclusively presumed that the redevelopment area is a blighted area and that all prior proceedings have been properly and regularly taken."

This language is taken from similar California redevelopment statutes, and we may therefore look to California's interpretations for guidance.[52] The California Supreme Court, interpreting a statute that provides for a sixty-day period to contest a redevelopment plan, has stated that judicial review of a finding of blight (and therefore public use) must be commenced within the statutory period.[53] Once the sixty-day period expires, no new action to challenge the findings may be filed, and a conclusive presumption of blight applies.[54]

The Plan in this case was not challenged within the ninety-day period provided by Nevada statutes; therefore, the district court erred in considering whether substantial evidence supported the determination that the downtown area suffered from physical, social or economic blight. Moreover, even if such a challenge had been timely made, the record reflects substantial evidence in support of the Agency's determination of blight.

---

[52]*Crockett*, 117 Nev. at 824, 34 P.3d at 559.

[53]*Sweetwater Valley Civic Ass'n*, 133 Cal. Rptr. 859, 555 P.2d at 1102-03.

[54]*Id.* at 1103.

Specifically, evidence was presented to the Agency indicating that the downtown area, including the area in the immediate vicinity of the Pappases' property, suffered from higher crime rates than the rest of the City of Las Vegas. Vacant lots, burnt out buildings, and vacant buildings were present on many of the downtown blocks. Visitor volume had been consistently decreasing. Businesses were relocating outside of the downtown area. Most of the buildings in the area were over thirty years old and renovations would require substantial upgrades to comply with existing building codes. While the surveys and investigation may not have been as intensive as in some of the reported cases, they certainly provide substantial evidence of blight. Thus, the district court erred in finding the area was not blighted.

The Pappases further contend that even if the area in general can be considered blighted, their particular property was not blighted; therefore, it could not be subject to eminent domain. The United States Supreme Court rejected this type of argument in the seminal case of *Berman v. Parker.*[55] In *Berman,* the High Court stated, "Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending."[56] The Court further concluded, "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not [blighted] . . . integrated plans for redevelopment would suffer greatly."[57]

Although the area in *Berman* involved slums and an urban renewal statute, rather than a community redevelopment statute,

---

[55]348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

[56]*Id.* at 35, 75 S. Ct. 98.

[57]*Id.*

its rationale still applies. The specific building at issue in *Berman* was not itself blighted.[58] The building was to be taken from a private owner and managed by a private agency.[59] The Court concluded, however, that redevelopment encompasses an entire area, not just individually blighted sections.[60] The Court observed that the "piecemeal approach, the removal of individual structures that were offensive, would be only a palliative."[61] Through redevelopment "it was hoped that the cycle of decay of the area could be controlled."[62] Consistent with *Berman,* the fact that the Pappases' property itself was not blighted does not prohibit its taking through eminent domain proceedings.

We note, however, that while a property owner may not challenge a redevelopment plan's finding of blight beyond the ninety-day statutory deadlines, the issue of blight may still be raised as it relates to the specific project involved in a condemnation proceeding. A property owner may raise, as an affirmative defense to the taking, that blight originally identified in the plan or project no longer exists[63] or that the particular project is the product of fraud or collusion between the governmental agency and the private entities who will

---

[58]*Id.* at 31, 75 S. Ct. 98.

[59]*Id.*

[60]*Id.* at 34, 75 S. Ct. 98.

[61]*Id.*

[62]*Id.* at 35, 75 S. Ct. 98.

[63]*See 99 Cents Only Stores,* 237 F. Supp. 2d at 1130-31; *Aposporos v. Urban Redevelopment Com'n,* 259 Conn. 563, 790 A.2d 1167, 1175-77 (2002).

develop the project[64] or the avowed public purpose is merely a pretext[65] or used in bad faith.[66]

The record reflects no basis for any conclusion that economic, social or physical blight was eradicated between the date the Plan was adopted in 1988 and the date the Fremont Street Experience project was approved in 1993. To the contrary, tourism and visitor volume continued to decline in downtown Las Vegas during those years. More businesses had left the area or closed down. Crime rates, particularly drug- and prostitution-related crimes, continued to be a problem. Inadequate parking had increased. Thus, the Pappases failed to establish that downtown Las Vegas no longer suffered from physical, social, or economic blight at the time of the eminent domain proceedings.

The same conclusion applies to any allegation of fraud, collusion, bad faith or pretext. The record contains no evidence that the Pappases' property was being acquired for some purpose other than a public parking facility and community redevelopment of a blighted downtown area. Because the record does not support the district court's finding of bad faith, we conclude the district court erred in basing its dismissal on this theory and relying on bad faith or pretext cases.

---

[64]*See 99 Cents Only Stores*, 237 F. Supp. 2d at 1130-31; *Aposporos*, 790 A.2d at 1175-77; *see also Southwestern Ill. Development Auth.*, 238 Ill. Dec. 99, 710 N.E.2d at 896.

[65]*Earth Management, Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455, 459-61 (1981) (condemnation was pretext to stop construction of hazardous waste disposal plant); *Armendariz*, 75 F.3d at 1320-21.

[66]*Pheasant Ridge Assoc. v. Burlington Town*, 399 Mass. 771, 506 N.E.2d 1152 (1987) (eminent domain proceedings designed to block construction of low and moderate income housing); *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo. Ct. App.1989).

Necessity

In an eminent domain proceeding, necessity is usually raised in the context of challenging whether a project furthers a public purpose and therefore constitutes a public use. It involves whether the property to be taken is necessary to accomplish the public purpose[67] and it encompasses the selection of the location of the condemned land.[68] However, the standard for challenging a taking for lack of necessity is even greater than that for challenging its public purpose. Courts may not question the wisdom of how to accomplish the public purpose absent a showing of fraud or bad faith.[69] It is up to the legislative body (in this case, the Agency) to determine how to accomplish the public purpose. Thus, the courts may not substitute their own judgment or dismiss an eminent domain action simply because the legislative branch has other methods at its disposal to accomplish the public purpose.[70]

The district court found that the Agency acted in bad faith because it could have entered into long-term ground leases with all of the owners of property on the block needed to construct the parking garage rather than acquire the property through condemnation. However, the record contains no evidence to support such a finding. The record reflects that the Agency rejected this approach because it would severely affect the financing for the garage. There is no evidence to suggest any

---

[67]*Denver West Metro. Dist.*, 786 P.2d at 436.

[68]*Thornton Development Authority*, 640 F. Supp. at 1076.

[69]*Port of Umatilla v. Richmond*, 212 Or. 596, 321 P.2d 338, 350-51 (1958); *Denver West Metro. Dist.*, 786 P.2d at 436; *Thornton Development Authority*, 640 F. Supp. at 1076.

[70]*Port of Umatilla*, 321 P.2d at 350-51; *Denver West Metro. Dist.*, 786 P.2d at 436; *Thornton Development Authority*, 640 F. Supp. at 1076.

other reason for the decision. The Agency's condemnation decision does not constitute bad faith, and the district court erred by substituting its judgment for that of the Agency as to the appropriate method for acquiring the property.

Pappases' counterclaims

The Pappases' counterclaims involved several concepts. They claimed that the Agency's inclusion of their property in the Fremont Street Experience project constituted inverse condemnation, that the Agency violated their due process rights during the initial motion for occupancy, and that their property was taken without just compensation. The record indicates no basis for these claims, and the district court correctly granted summary judgment on them. Issues of inverse condemnation and just compensation were subsumed within the original condemnation complaint. The Agency correctly followed the procedures for gaining immediate occupancy, and any alleged confusion generated by the pleadings was addressed in the Pappases' motion for reconsideration. Since they were given notice and an opportunity to be heard, due process was satisfied. Thus, the district court did not err in dismissing these counterclaims.

The Pappases also asserted a counterclaim seeking declaratory relief or damages for the Agency's alleged failure to permit them to participate in the project through a long-term ground lease. They base this assertion upon NRS 279.566(1).[71]

---

[71]NRS 279.566(1) states:

> Every redevelopment plan must provide for the participation and assistance in the redevelopment of property in the redevelopment area by the owners of all or part of that property if the owners agree to participate

Pursuant to the statute, the Agency has enacted rules establishing guidelines for owner participation. The rules provide that the owners and tenants of real property in the redevelopment area are eligible to participate in the redevelopment of property within the area subject to certain factors, such as changes in zoning or land use regulations, street realignments, the ability of participants to finance acquisition, development or rehabilitation of their project, reduction in total number of individual parcels in the area, and construction of public facilities.[72] The rules also provide that the owners have a reasonable opportunity to retain their properties, acquire adjacent properties, sell and relocate, rehabilitate or participate in new development.[73] The Plan mirrors the rules by indicating that participation opportunities are necessarily subject to and limited by the same factors cited in the rules.[74]

The plain language of the statute, rules and Plan does not give the Pappases an absolute right to participate in a particular project. It does permit landowners to propose a development project involving their property or to combine with other landowners on a project. It also mandates that such proposals be evaluated fairly. It does not, however, require the Agency to approve any proposal. California courts, when interpreting similar statutes and rules, have come to the same conclusion. The California Supreme Court has determined that there is no absolute right of owner participation in the redevelopment of

---

in conformity with the redevelopment plan adopted by the legislative body for the area.

[72]City of Las Vegas Downtown Redevelopment Agency, Rules Governing Participation § 300.

[73]*Id.* § 400.

[74]Redevelopment Plan for the Downtown Las Vegas Redevelopment Area § 410.2 (Jan. 22, 1986).

any individual parcel in a redevelopment area.[75] Whether to allow owner participation in a given project, and under what circumstances, are matters left to the discretion of the agency.[76]

In this case, from the time their property was included in the redevelopment area until the approval of the Fremont Street Experience consistency project, the Pappases did not seek to participate in any redevelopment project utilizing their property. Once the property was identified as necessary for the parking garage, the Pappases did propose a long-term ground lease as an alternative to acquiring their property. Although initially inclined to consider this idea, the Agency rejected the long-term lease proposal when it became apparent that long-term leases would affect financing of the garage construction. No evidence was presented in opposition to the Agency's motion for summary judgment, indicating that the Agency's decision to forgo ground leases for the garage was the product of fraud or was not supported by substantial evidence. To the contrary, the only evidence presented on the issue demonstrated the need to have single ownership of the land to obtain favorable financing. The district court correctly concluded that no genuine issue of material fact existed as to this claim because no evidence was presented to indicate the Agency acted in bad faith when it rejected the ground-lease proposal.

Finally, the Pappases asserted causes of action relating to

---

[75] *In Re Bunker Hill*, 37 Cal. Rptr. 74, 389 P.2d at 563.

[76] *Sanguinetti v. City Council of City of Stockton*, 231 Cal. App.2d 813, 42 Cal. Rptr. 268, 275 (1965); *see also Fellom v. Redevelopment Agency*, 157 Cal. App.2d 243, 320 P.2d 884, 888-89 (1958) (property owner has no right to participate where agency condemns property for redevelopment project).

alleged rent losses incurred by them prior to the condemnation proceedings. The Pappases claimed that they lost rent from the time the Agency announced that the Pappases' property would be part of the Fremont Street Experience and that City or Agency employees interfered with the relationship between the Pappases and their tenants. While much of the evidence presented by the Pappases in opposition to the Agency's motion for summary judgment consisted of inadmissible hearsay (what tenants allegedly told Carol Pappas), sufficient admissible evidence was submitted on this claim to raise a genuine issue regarding material questions of fact to survive a motion for summary judgment. Thus, we conclude the district court erred in dismissing these counterclaims.

CONCLUSION

Substantial evidence supports the Agency's findings that the construction of the Fremont Street Experience, including the parking garage, furthers the public purpose of eliminating blight in downtown Las Vegas. Therefore, the Agency's use of eminent domain proceedings to acquire the Pappases' property for that purpose does not violate the Nevada or Federal Constitutions. The district court erred in dismissing the eminent domain action. With the exception of the claims involving pre-condemnation interference with tenants or rental opportunities, the district court did not err in dismissing the Pappases' counterclaims. Accordingly, we reverse the judgment of the district court dismissing the complaint in eminent domain and that portion of the district court's subsequent order pertaining to the lost rent claims and remand the matter to the district court for further proceedings in accordance with this opinion. The remaining portion of the district court's order dismissing the counterclaims is affirmed.

We concur: AGOSTI, C.J., and SHEARING and ROSE, JJ.

LEAVITT, J., dissenting:

The Agency's taking of the Pappases' property by eminent domain violates both the United States Constitution and the Constitution of the State of Nevada.

The United States Constitution states that no private property shall "be taken for public use, without just compensation."[1] The Constitution of the State of Nevada similarly provides that "[p]rivate property shall not be taken for public use without just compensation having been first made."[2]

The appropriation of a private citizen's property by eminent domain proceedings must be for a "public use" within the meaning of those words in the Constitution. The government's taking of property and giving it to another for a private use is unconstitutional and void.

The United States Supreme Court, in *Berman v. Parker,* upheld the transfer of property taken by eminent domain from one private party to another private party; however, the taking in that case involved a public use.[3] The Court permitted the transfer of privately owned property to other private parties because the redevelopment area involved slums in Washington, D.C., and the conditions in the area were injurious to the public health, safety, morals and welfare.[4] This court, relying on

---

[1]U.S. Const. amend. V.

[2]Nev. Const. art. 1, § 8, cl. 6.

[3]348 U.S. 26, 32-36, 75 S. Ct. 98, 99 L. Ed. 27 (1954) (transfer of property permissible to eradicate "slums" or "blight").

[4]*Id.* at 32-33, 75 S. Ct. 98.

Berman, previously upheld a redevelopment plan that was attempting to eradicate blight.[5]

Under Nevada law, a redevelopment area must include a "blighted area, the redevelopment of which is necessary to effectuate the public purposes."[6] The Pappases' property was not a slum. The City's survey gave no indication that the property was blighted in any way. There certainly were no conditions injurious to the public health, safety, morals and welfare. The property was adjacent to a savings and loan building and across the street from a bank. The redevelopment statute requires "[a]ll noncontiguous areas of a redevelopment area [to be] blighted or necessary for effective redevelopment" before adopting a redevelopment plan.[7] The Agency failed to demonstrate that the taking of the Pappases' property was necessary for effective redevelopment; it demonstrated only that it was desirable.

The California Supreme Court has concluded that "[a] finding of blight requires (1) that the area suffer 'either social or economic liabilities, or both, requiring redevelopment in the interest of the health, safety, and general welfare' and (2) the existence of one of the characteristics of blight."[8] In *Sweetwater Valley Civic Ass'n v. National City,* a redevelopment agency sought to take a golf course it considered blighted so that a private party could construct a

---

[5]*Urban Renewal Agcy. v. Iacometti,* 79 Nev. 113, 121-22, 379 P.2d 466, 467 (1963).

[6]NRS 279.586(1)(a).

[7]NRS 279.586(1)(f).

[8]*Sweetwater Valley Civic Ass'n v. National City,* 18 Cal. 3d 270, 133 Cal. Rptr. 859, 555 P.2d 1099, 1103 (1976) (quoting California statute governing redevelopment of blighted areas).

shopping center.[9] The court concluded the agency lacked evidence of social blight and that the golf course was economically profitable; therefore, it was neither an economic nor social liability.[10]

Here, there was no evidence of blight in or around the Pappases' property; thus, the goal of eliminating blight, which in some cases may be a legitimate public use, is not applicable in this case. The Supreme Judicial Court of Massachusetts considered limitations on the acquisition of private lands and the definition of public use in a 1955 decision involving facts similar to these.[11] There, the Massachusetts Legislature proposed an act that would authorize the use of public funds to acquire private lands, to be followed by redevelopment of some portions for public use and the sale of the remainder to the highest bidder for private use.[12] The court held that the expectation that adjacent areas and the city as a whole would benefit from the taking did not constitute a public use.[13] The court further noted,

[I]n dealing with this difficult subject one proposition is thoroughly established practically everywhere, and so far as we are aware without substantial dissent, and that is that public money cannot be used for the primary purpose of acquiring either by eminent domain or by purchase private lands to be turned over or sold to private persons for private use.[14]

---

[9]*Id.* at 1100.

[10]*Id.* at 1104.

[11]*In re Opinion of the Justices,* 332 Mass. 769, 126 N.E.2d 795 (1955).

[12]*Id.* at 796-97.

[13]*Id.* at 803.

[14]*Id.* at 802.

Federal courts have agreed, particularly when the claimed public use is pretextual:

> "If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings."[15]

The taking of the Pappases' property by the City of Las Vegas Downtown Redevelopment Agency under the pretextual guise of a "public use" is unconstitutional and void, since the plan was to give the property to the Fremont Street Experience, a private limited liability company, which would receive all revenues from the parking garage and retail space leases.

I would affirm the district court's dismissal of the case.

MAUPIN, J., dissenting.

I would affirm the result reached by the district court based upon my dissent in Las Vegas Downtown Redevelopment v. Crockett.[1]

---

[15] *99 Cents Only Stores v. Lancaster Redevelopment*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (quoting *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir.1996)).

[1] 117 Nev. 816, 34 P.3d 553 (2001).

Amendment of the Plan

The Fremont Street Experience, the redevelopment project in this matter, is subject to the same redevelopment plan and is within the same redevelopment area with which we were concerned in *Crockett.* Because I conclude that the signal feature of the project, the vacation of the oldest and one of the most traveled public boulevards in the city, effected a material change to or deviation from the governing redevelopment plan, I also conclude that the Agency improperly failed to seek formal amendment of the Plan before taking properties via eminent domain.

The *Crockett* majority held that the vacation of four streets and the relocation of a public park did not constitute a material deviation from or change to the redevelopment plan involved in this case. A fair reading of the majority opinion in *Crockett* supports the implied ruling by the majority in this case that resort to the formal amendment process provided for under NRS 279.608 was legally unnecessary. This notwithstanding, I remain of the view that *Crockett* was wrongly decided on its facts and should be revisited.

The redevelopment area in this case encompasses virtually the entirety of old downtown Las Vegas, bounded on the west by Martin Luther King Boulevard, on the east by Bruce Avenue, on the north by Washington Avenue, and on the south by Sahara Avenue. As noted by the majority in *Crockett,* the plan was approved to "eliminate and prevent the spread of blight and deterioration," contemplating acquisition of real property by purchase and by eminent domain, "transfer of acquired real property to public or private entities," and the "demolition of buildings . . . construction of parks, development and construction of hotel and 'tourism/recreational' facilities, and

the widening, closure and vacation of streets and alleys" in the redevelopment area.[2] Although I agreed with the *Crockett* majority that redevelopment plan amendments are only necessitated when a proposed project entails a material deviation from the redevelopment plan, and although I agreed that formal amendment of a plan is not per se necessary to commence any project, I concluded that the vacation of parks and streets without formal plan amendment ran afoul of NRS 279.572 and NRS 279.608:

The ability to amend under NRS 279.608 is quite specific in terms of the procedure to be followed. However, there are no stated criteria in this statute governing when the amendment process is required, other than the statement in subsection (3) that "substantial" changes must be submitted in a written recommendation for consideration by a city or county government to amend the plan. Thus, I believe NRS 279.608 and NRS 279.572 must be read together to determine legislative intent. As noted, NRS 279.572 requires that redevelopment plans show open spaces, layout of streets, size, height, number and proposed use of buildings, number of dwelling units, property to be devoted to public purposes, other covenants, conditions, and restrictions, etc. While changes in the use of individual dwelling units and building sizes may involve mere details not requiring resort to the formal amendment process, vacation of streets and relocations of public parks depicted on the approved map are entirely different matters. Certainly, vacation of streets and relocation of parks are not "details" . . . .[3]

Thus, while the plan in *Crockett* and in this case empowers the

---

[2]*Id.* at 819, 34 P.3d at 555.

[3]*Id.* at 834, 34 P.3d at 565 (Maupin, C.J., dissenting).

Agency to vacate public streets, as well as take other actions without resort to formal amendment of the plan, I am of the view that such powers are beyond those sanctioned in the statutory framework governing redevelopment unless the plan itself has been approved with the material changes sought. In *Crockett,* I also commented upon the Agency's need to promote flexibility and quick response to changing conditions. In doing so, I noted that the vacation of streets was not a measure that interfered with the need for expeditious action in response to changing economic conditions. I would also note that the assemblage of multiple parcels, as was done in this case to build the garage that now occupies the properties owned by the Pappas family, was likewise not done as a quick response to changing conditions. No one in this controversy has seriously suggested that the economic blight the City and the Agency sought to alleviate was anything other than a long-term developmental problem.

My vote to affirm is not based upon agreement with the district court's myriad justifications for dismissing the eminent domain action below, including its ruling that all redevelopment projects implicate the formal amendment process under NRS 279.608. Rather, it is based upon my view that, while there is no absolute requirement that redevelopment plans be formally amended to accommodate any redevelopment project, the nature of the project in question here mandated that the Agency submit to an amendment process prior to utilizing the power of condemnation to consolidate and assemble the affected parcels. In this, I note that the district court did not have the benefit of the *Crockett* decision when it determined that formal amendment of the Plan was a condition precedent to the exercise of eminent domain in this instance. However, as discussed below, because plans such as the 1986 Plan at issue here must of necessity be drafted in general terms, the

requirement to amend should be fairly broad.[4]

Blight issues and the amendment process

Appellants claim that any issue of blight was conclusively resolved at the termination of the ninety-day protest period under NRS 279.609 following the adoption of the Plan in 1986, during which respondents took no action concerning the findings of blight within the redevelopment area. Respondents claim that evidence in support of the original determination of blight in the redevelopment area was flawed and insufficient. This, in fact, was one of the primary underpinnings of the district court's decision. To me, neither side has completely analyzed the procedural framework within which blight issues may be raised.

Appellants correctly argue that any questions regarding the problem of potential or existing generalized blight in the redevelopment area was conclusively established after expiration of the protest period following adoption of the original Plan. In my view, the district court relied too heavily upon the documentation it ordered produced concerning blight studies prior to the adoption of the Plan and the delineation of the redevelopment area in 1986. As noted by the Agency, the development of elaborate or comprehensive written documentation of blight was even unnecessary to a valid determination by the City that the redevelopment area as a whole contained widespread physical, social and economic blight. This was a decision that could be properly drawn from individualized knowledge of members of the Council who were

---

[4]Projects such as the Fremont Street Experience are extensive enough to require material changes to a redevelopment plan beyond simple vacation of streets, thus implicating the formal amendment process.

in a position to judge the merits of the blight issue. Because no one lodged objection to the blight findings within the ninety-day period, any judicial tribunal must give deference to those findings. This deference, however, does not end the matter. Here, respondents could have reasonably concluded at the time that such a protest was unnecessary because the Plan did not establish that the Plan area suffered from blight in its entirety and that they could protest at a later time whether a particular project would meet the objectives of the Plan, *i.e.*, the alleviation of blight in their particular neighborhood and its environs. Going further, it is quite understandable that no individual landowner lodged formal objections either administratively or within the judicial system because of the daunting and probably prohibitively expensive task of challenging the validity of the entire Plan. Also, because ample justification existed to support the establishment of the downtown redevelopment area, and because the mayor, city manager, members of the Council and at least one attorney representing the City made public assurances that the utilization of eminent domain to effect redevelopment projects would only come as a last resort, landowners in the area cannot be criticized or deprived of more discrete protest rights for not taking action against the Plan during the initial ninety-day period. Accordingly, while the respondents in this case have given up the right to contest the general resolution adopting the Plan and the blight findings inherent in it, they should still have been able to lodge objections in the context of a formal plan amendment concerning the Fremont Street Experience project on the grounds that takings pursuant to the amendment would not serve to alleviate blight in the neighborhood, *i.e.*, were inconsistent with the goals of the original Plan, or were not effected for public use. Whether they would have been successful may be doubtful, but they were still entitled to that forum. From there, these landowners could have sought

administrative review in district court and litigated the issues they are trying to litigate now, long after the demolition of their property and the construction of the parking garage.[5] For these reasons, I feel *Crockett* too narrowly defines a redevelopment agency's duty to seek plan amendments to accommodate specific projects.

General issues concerning redevelopment

The majority correctly concludes that a redevelopment plan or project serves a public purpose when the plan or project bears a rational relationship to the eradication of physical, social or economic blight, and that ultimate ownership of taken properties may be eventually assumed by other private interests if in aid of the public use. The majority also correctly concludes that non-blighted properties may be taken in support of an integrated plan of redevelopment to alleviate blight in a particular neighborhood or area.[6] The respondents agree with these propositions[7] but cling to the arguments that there was

---

[5]*See Redevelopment Agency, Etc. v. Herrold*, 86 Cal. App.3d 1024, 150 Cal. Rptr. 621, 625 (1978).

[6]*See Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

[7]The majority apparently misconstrues respondents' arguments in its recitation that respondents claim that the takings were illegal because their individual properties were not blighted and that eminent domain can never be used where the taking involves transfer of land from one private owner to another. My reading of respondents' arguments is that the project area, including their properties, was not blighted and that the taking here was not an integrated plan to alleviate blight in the area directly affected by the project; and that the transfers of property taken via eminent domain in *this* case were not consistent with the furtherance of a public use through redevelopment. Counsel for the respondents concedes that the utilization of eminent domain to effect redevelopment where taken properties are ultimately transferred to private entities is not per se violative of the Fifth

insufficient showing of blight in the first instance, that the Fremont Street Experience was not "redevelopment," and that the transfer of the taken properties to the private entity here was a private benefit, not a public use.

In light of the above, I agree with the proposition that generalized blight issues and concerns in connection with the redevelopment area were conclusively established in 1986, that economic blight may be the subject of redevelopment effected via the use of eminent domain, and that, in Nevada, private entities comprised of hotel/casino properties may participate in a redevelopment project and therefore take title to redevelopment property acquired through the use of eminent domain. Thus, I disagree with the district court's findings below that this type of redevelopment cannot embody a public use or constitute redevelopment as a matter of law.

CONCLUSION

While the district court erred in its conclusion of law that formal amendment is a condition precedent for *any* plan of redevelopment, the profound nature of *this* Plan required that *this particular* project go through the scrutiny of a formal amendment process. In this way, the affected landowners would have had a full opportunity to administratively air their views and have those views considered by the Agency prior to undertaking the project--views including whether the project was consistent with the elimination of physical and economic blight within the immediately affected area.

Amendment to the Federal Constitution.

I would therefore affirm the result reached below.[8]

---

[8]I note that the traditional measure of damages prohibits the landowner from receiving damages based upon a post-taking evaluation or appraisal. Although we have never reached this issue, because this unique type of condemnation proceeding involves redevelopment and the transfer of private property to another private enterprise entity, it would be reasonable that the respondents be awarded damages based upon the upgraded value of the property caused by the redevelopment. To that degree, they would be receiving a fair benefit for their contribution to the redevelopment area. I urge the parties to explore this possibility on remand.

Appendix B

DISTRICT COURT
CLARK COUNTY, NEVADA

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, Plaintiff, and Fremont Street Experience Limited Liability Company, and Fremont Street Experience Parking Corporation, Intervenors, vs. CAROL PAPPAS; JOHN H. PAPPAS, JR.; HARRY PAPPAS, DANNY CURTIS dba DANNY'S BAIL BONDS, AL BAIL BONDS, BOB ARCHIE BOND, BONDSMAN BAIL BOND; ADRIENNE LOBELLA dba GOLD JEWELRY SOURCE; EDDIE RODRIGUEZ dba AAAACE JEWELERS; JOSE MEJIAS VELASIO; CINDY SCHUM; UNITED STATES OF AMERICA; CITY OF LAS VEGAS; a municipal corporation, and Clark County, and	) Case No. A327519) Dept. No.: XIII) Docket No.: "G" **MOTION TO DISMISS**

any and all persons claiming any right, title or interest in or to the subject property;

Defendants.

CAROL PAPPAS; JOHN H. PAPPAS, JR.; HARRY J. PAPPAS.

Defendants and Counterclaimants.

vs.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY,

Plaintiff and Counterdefendants.

ADRIENNE LOBELLA dba GOLD JEWELRY SOURCE,

Defendants and Counterclaimants,

vs.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY,

Plaintiffs and Counterdefendants.

DECISION AND ORDER

FACTUAL HISTORY

_____Sometime in the 1940's, the Pappas Family, immigrants from Greece, acquired two parcels of land comprising seven thousand (7,000) square feet on the corner of Las Vegas Boulevard and Carson Streets in Las Vegas, Nevada. The Pappas Family rented out the land to small businesses thereby obtaining the income to purchase the property and to pay their property taxes to the City of Las Vegas.

In 1957, the Nevada Legislature, as well as the Federal Government, became concerned about the decline of urban areas. In order to rejuvenate these areas, the Government embarked on a program of Urban Renewal. The Nevada statutes regarding Urban Renewal are found at NRS 279.010 through 279.380. The urban renewal laws require that each urban renewal plan and project be approved by the planning commission and the local governing body after public hearings. The plan or project must then be approved by the voters at either a special or general election. [NRS 279.270]

In 1959, the Legislature added another weapon to its arsenal against urban decay. The Legislature added the Community Redevelopment Law at NRS 279.382 through 279.685. These redevelopment plans did not require a vote of the public for passage but did set out a detailed procedure for public hearings and amendments of the plan.

Neither of these Legislative initiatives had much impact on either the City of Las Vegas nor the Pappas Family. Whatever "urban renewal" was being done in Las Vegas was minimal and was based on the City Charter and not on the

Statutes. All of this changed in 1985 with the City's sponsorship of SB 474, and in particular, its introduction of tax-increment bond funding for redevelopment.

At the Senate hearing on May 20, 1985, the City of Las Vegas took the lead in testifying before the Senate Committee on Governmental Affairs regarding these changes. The City was so aggressive in its support of SB 474, that Senator Robert E. Robinson asked if the City had a designated area targeted for this redevelopment project. Britt Ferguson, one of the two Las Vegas lobbyists, responded "No." Senator Robinson then asked Ferguson who were the commissioners on the board of urban renewal. Ferguson replied that there were none as the program was in its preliminary stages and an agency had not yet been established.

At the same hearing, Senator Thomas J. Hickey, the Chairman of the Committee asked about the repealers in the bill. Ferguson responded that most of the repealers dealt with eliminating the current requirement for a tentative plan. Chairman Hickey questioned why the City would eliminate the submission of plans. Rose Thorton-McKinney, the other lobbyist for the City of Las Vegas, responded that "it is not eliminating the submission of a plan, but eliminating a part of the process. Presently it is necessary to submit a preliminary, tentative and final plan. The bill would exclude the tentative plan."

Both lobbyists also read from prepared texts that were entered as Exhibits C and E. Exhibit E, Ferguson's remarks, reveal the City's motivation in sponsoring this bill. Ferguson reiterated Thorton-McKinney's view and added the following: "and the distinction between "project" areas and "redevelopment" areas, which exist in the current law are

eliminated. It's not altogether clear under the current law what the difference is between a "redevelopment" area and a "project" area. It is, however, clear that the distinction serves no useful purpose."

In addition, Ferguson introduced an amendment to the bill that was entered as Exhibit D. The amendment, is the predecessor to NRS 279.609 which limits the time to challenge the validity of the redevelopment plan or amendment thereto.

In addition to the previously mentioned changes, SB 474 also made the following adjustments in the law:

1. Allowed bonds to be issued for all economic development purposes not only industrial uses.

2. Set aside tax revenues for redevelopment agencies by freezing the tax base that schools, police and fire departments could draw on for funds and diverting that money to pay for the redevelopment bonds.

3. Amended NRS 37.010 to allow eminent domain to be used for redevelopment in compliance with NRS 279.382 to 279.680.

4. Amended the City Charter of Las Vegas to allow the City to utilize the Act.

The Legislature passed SB 474 on June 12, 1985.

On November 6, 1985, the City had adopted its initial resolution of necessity for the establishment of a redevelopment agency. With the adoption of the resolution, the Las Vegas Downtown Redevelopment Agency (hereinafter Agency) was

created. The Agency is actually the City Council of Las Vegas; there are no public members of the Agency. The Executive Director of the Agency is the City Manager.

It was not until November 19, 1985, weeks after the resolution of necessity, that the City had its employees conduct block surveys of the targeted area to determine the overall conditions in the target area. Moreover, none of the block surveys completed by the City, and submitted to this Court, indicate any findings of blight. Most of the block surveys have very little written on them. Even blocks indicating no negative comments, such as the downtown hotel-casinos, are included in the redevelopment area. Interestingly, the block where the Pappas property is located is not even included in the survey. The area encompasses a wide stretch of downtown Las Vegas. The wider the area, the more tax revenue to be engendered by the Agency.

The resolution designating a portion of downtown Las Vegas as an area for evaluation as a redevelopment area was adopted on December 18, 1985. On January 9, 1986, three weeks later, and without public comment or notice, the Planning Commission adopted a resolution designating the redevelopment area. On January 15, 1986, the City Council adopted the Planning commission's recommendation, again without notice or comment, and designated that resolution as the "preliminary plan." On January 28, 1986, the Planning Commission approved the Plan and submitted it to the Agency, who adopted it on February 5, 1988.

On January 17, 1986, the Agency ordered the required public notice to be published in the Las Vegas Sun for the requisite four weeks. The official public hearing on the adoption of the redevelopment plan was set for February 19,

1986. In order to adopt its Plan, the Agency, was required to send letters to each of the landowners in the designated redevelopment area. The Pappas Family was one of the landowners that received a letter from the Agency. The letter dated January 27, 1986, and which was signed by City Manager, Ashley Hall, advised Pappas of the public hearing and the effect of the inclusion of their property in the redevelopment area. Specifically, the letter informed Pappas of the following:

> "The Redevelopment Plan also empowers the Redevelopment Agency with the power of eminent domain. The power to acquire property by purchase or condemnation to eliminate blight, further the public good or permit development in accordance with the Redevelopment Plan cannot be done without just compensation and under due process of law.
>
> - Although the Redevelopment Agency has no plans to acquire all of the property in the Redevelopment Area, and has not at this point identified any specific properties it would consider acquiring, all property in the Redevelopment Area is subject to the possibility of acquisition or condemnation by the Redevelopment Agency under the circumstances set forth in the Redevelopment Plan."

The letter did not inform Pappas of any right to oppose the inclusion of their property within the Redevelopment Area nor what actions could be taken to oppose the Redevelopment Plan.

Nor did the letter advise Pappas that anyone who denies the existence of blight in the proposed redevelopment area or the regularity of any of the proceedings, may appear before the legislative body and show cause why the proposed plan should not be adopted. The letter was accompanied by a Notice of Public Hearing on the Redevelopment Plan for the Downtown Las Vegas Redevelopment Area which set out the general goals and objectives of the proposed Redevelopment Plan. The letter was also accompanied by a single-spaced, fine print legal description of the Downtown Redevelopment Area and a map thereof.

It was standing room only at the City Council Chambers on February 19, 1986. Several people were able to speak, but others were not. At that hearing, the main concern of the citizens appeared to be the use of eminent domain by the Agency. The City officials repeatedly assured the citizenry that eminent domain would rarely be used. Mayor Briare began the meeting by assuring the citizens that the "City is required, of course, to follow the State Law, and because of the significance of this hearing this afternoon, we're going to follow the State Law to the letter. .....[sic] Nobody is going to throw anybody out of their home, for example." [Hearing Transcript (HT), p. 1]

Special Counsel Brent Hawkins[1] stated:

> "Property acquisition and eminent domain in particular is used very sparingly and under very closely watched procedures. The

---

[1]Brent Hawkins was with the same Sacramento, California firm of McDonough, Holland & Allen with whom Plaintiff's current special counsel, Mark Wasser, is affiliated.

> Redevelopment Plan also contains provisions for owner participation where tenants and property owners in the project area can become active participants in the redevelopment of the area. Owner participation can take many different forms. It can be as simple as the Agency making a finding that a particular piece of property is in conformance with the Redevelopment Plan and waiving the power of eminent domain for that particular parcel. ....Owner participation is one of the principal means that we have for carrying forward redevelopment in the project area and one of the things that the Agency does in connection with the adoption of the Redevelopment Plan is the adoption of Owner Participation Rules." [HT, p. 15-16]

On Page 20 of the Hearing Transcript, Councilman Levy says that:

> "Eminent domain will be used very, very nominally if any at all. I think that there's an over fear on that situation, especially in the neighborhoods. I don't think there'll be – if any, it will be the absolute last resort ..."

City Attorney George Ogilvie was asked to provide an explanation on condemnation by Mayor Briare. Mr. Ogilvie explains the theory of "highest and best use" and then goes on to say:

> "If there is no meeting of the minds on what the property is worth, the City stands steadfast on

> the price that it has offered and the property owner stands steadfast on the price that he is asking and the City still desires to acquire the property, then, and only then will the power of eminent domain be applied." [HT p. 21]

City Manager Hall reports that:

> "First of all, we have not made a study as to how many businesses we would be putting out. At the present time until a development plan comes by a developer, we will not know. At the present time the City of Las Vegas is not contemplating buying any property for its own use or for its own development use. That would be a private business that would do that." [HT p. 31]

On page 32 of the hearing transcript, Mayor Briare, Britt Ferguson and City Manager Hall each state their opinion as follows:

Mayor Briare:

> "Hopefully, if a plan can be arrived at and as propositions or others, private developers come forward, we will see. There's going to be plenty of homes here. It's not like we are going to wipe out all of Downtown Las Vegas including your area into a big empty lot and then start building. No, sir, it's a phase and I don't think your question can be answered as to when or how that area develops unless we had a specific application before us."

and again at page 43:

> "we do have a plan, which has to come first, and even though emotions might be boiling for things that'll never happen in this world, nevertheless, they are concerns to people and that's what we are here to listen to."

Britt Ferguson:

> "...we can issue what's called a certificate of conformance which essentially commits the City never to use its power of eminent domain as long as that property is continued in that use and that use is in conformance with the plan." [HT p. 32]

and again at page 33:

> "so I think that people may be getting upset about something that really is never going to happen."

Ashley Hall:

> "... the City presently has no plans for buying any of your private homes. Again, that would be on a development by development basis and the area covered generally would be in the commercial areas and not in the residential area."

and again on page 42:

> "Yes, just to comment right quickly and that is that under a redevelopment plan, a plan would have to be proposed for your piece of property that would basically determine the value of that property. The City, again, would not go in and condemn property without a plan in place to – that would indicate what the potential value of that piece of property would be."

Over and over, City officials assure the public that eminent domain will not be used. Director of Finance Marvin Leavitt states that the City does not have the money to engage in eminent domain. [HT p. 38] Councilman Levy tells the crowd:

> "I'd just like to make one comment about eminent domain. This Board has always had the power of eminent and you've seen how we use it in the past. Never–." Mayor Briare interrupts with "that's true", and Levy concludes with "since I've been on this Board." [HT p. 57-58]

Mayor Briare closes the public hearing with these words:

> "I wish that we had time to allay your fears or to consider the possibility that we have threats in mind. That word "threat" is used in a legal connotation which I assure you that nobody on this Council wants to threaten anybody; and nobody's going to be going out and tearing anything down on a large scale basis. We don't want any senior citizens to be fearful because the reason you want to clean up an area is to prevent that sort of thing."

Reassured by the City leaders that they were safe from the use of eminent domain and encouraged by the fact that as landowners they would be allowed to participate in any redevelopment, the citizens in the designated redevelopment area did not challenge the City's plan. Additionally, the citizens were never told of their right to challenge the Plan. Further evidence of this is found in the Hearing Transcript at page 55 in the exchange between Mayor Briare and a Mrs. Clark. Mrs. Clark seeks to learn if any of the comments at the hearing will change anything in the text. Briare informs her that the board will decide the question. Mrs. Clark persists and asks what sections in the Plan protect an individual citizen. Briare tells her that the protection is this public hearing. He cuts her off without answering her question by stating that there is "nothing in here that is designed to hurt them." Mrs. Clark and the assembled citizens are never informed of the right to legally challenge the Plan.

On March 5, 1986, Ordinance No. 3218 adopting the Redevelopment Plan was approved by the City Council without any further public hearing. The City and the Agency began issuing bonds and engaging in redevelopment. Despite the promises of the government leaders, the City immediately began to use the power of eminent domain. One of the first projects involved the taking of Gary Stafford's property which was occupied by a wedding chapel and bail bonds office in favor of the expansion of a law office that was Stafford's neighbor. That project, at the corner of Las Vegas Boulevard and Bonneville, is the building of Plaintiff's counsel, Beckley, Singleton, Jamison and List. Ironically, the attorneys had proposed building their parking garage at that corner, however, the Agency's staff persuaded the firm to place the garage behind the office building.

None of the aforementioned had any direct impact on Pappas or their property. They continued to lease out their property to various tenants and pay their taxes.

In 1992, the Downtown Progress Association (hereinafter DPA) and Strategic Associates, a consulting firm, began planning what is now commonly known as the Fremont Street Experience. DPA and the Agency began to make plans to acquire the property for the project. In September 1993, to continue this project, the Fremont Street Experience Limited Liability Company (hereinafter LLC) was formed. The LLC has a nine member board of directors composed of Donald D. Snyder as Chairman, President and CEO and representatives from the following hotel and casinos: the Four Queens, the Golden Gate, the Las Vegas Club, the Golden Nugget, Binion's Horseshoe, Fitzgerald's, The Plaza/El Cortez and the Fremont. In 1993, the LLC also formed the Fremont Street Experience Parking Corporation as a wholly owned subsidiary with Mr. Snyder as its only employee. Thereafter, the LLC and the Agency entered into a development agreement. That agreement called for the construction of a parking garage on the block that is bordered on one side by Las Vegas Boulevard and on the other three sides by Fremont Street, Carson Street and Fourth Street. The block was a developed commercial property of which the Pappases owned the southeast corner. As part of the agreement, the Agency agreed to pay Six Million, Four Hundred Thousand ($6,400,000) to acquire the property through eminent domain upon which the parking garage was to be constructed. Any costs in excess of $6,400,000 to attain the property were to be borne by the LLC. The LLC also retained a right to veto the amount that the Agency would pay as just compensation for the property if that price exceeded ten percent (10%) of the "appraised value" as prepared by the Agency. In furtherance of its agreement with the LLC, the City presented

the Pedestrian Mall Act (A.B. 411) to the Nevada Legislature. The Act, which became effective on July 1, 1993, had only one purpose: the creation of the Fremont Street Experience. [Minutes, Assembly Committee on Governmental Affairs, 6/2/93 at p. 5.]

This Agreement between the LLC and the Agency would greatly impact Pappas as well as other landowners. On April 26, 1993, with the LLC deal close to finalization, the Agency, in an attempt to comply with NRS 279.566; the owner participation statute, again sent a letter to Pappas. The letter from Executive Director William Noonan informed Pappas as a landowner in the project area of the intent to develop a parking garage with retail space on the property. The letter invited the landowner to submit an alternative proposal by May 28, 1993. Along with the letter was a project information checklist that listed approximately thirty-five (35) items that the Agency preferred to have included with any alternative plan. On May 19, 1993, Pappas responded to the letter informing the Agency of her desire to participate in the development of the parking lot by entering into a long-term lease with the City. The letter further informed the Agency that Pappas had no desire to sell the land and that the letter was submitted as a proposal in response to the Agency's solicitation of alternative proposals. There is no record of a response to the May 19, 1993 letter nor is there anything in the record to indicate that the Pappas proposal regarding a land lease was ever considered by the Agency.

Pappas received another letter on August 10, 1993, this time from the Acting Executive Director, Larry Barton, informing her that the Agency and the DPA had been working diligently for months on the Fremont Street Experience, but that in order to complete its project, they needed to purchase

the Pappas property. The letter informed Pappas that the Agency wished to acquire her property and that the Agency had received authority to commence court proceedings to do so. However the letter continued, the Agency would prefer simply to purchase the property, for the assessed value of Three Hundred and Forty Thousand Dollars ($340,000) as court proceedings could be very expensive. The appraisal, which was done by Timothy Morse, MAI, and Larry D. Snyder was based on the value of the property as of August 19, 1992, eight months prior to the date of the Barton letter to Pappas. The appraisal recites that it was prepared at the behest of the Agency for possible acquisition by the Agency in connection with the Fremont Street Experience. The appraisal contemplates the property's inclusion into a block with other parcels. Lastly, the letter informed Pappas that "the Agency is convening a Special Redevelopment Agency meeting to discuss those salient points on which the Fremont Street Experience Corporation (major downtown hotel/casino owners) and the Agency must agree before this project can commence." The meeting was scheduled for August 16, 1993 at 4:30 p.m. in the City Council Chambers.

Pappas did not immediately respond to this letter. On August 27, 1993, she received another letter from Barton that informed her that the property would be acquired at the same price as the previous letter except that her compensation would be adjusted downward to cover any environmental cleanup that might be uncovered. The letter again mentioned the use of eminent domain and gave Pappas until September 10, 1993 to respond to the offer. Pappas had moved and did not receive the letter until after the September 10th deadline. On September 14, 1993, Pappas wrote to the Agency informing them of her new address and of receipt of their letter. Richard Welch, Director of Operations for the Agency, responded to the letter

and gave Pappas until October 20, 1993 to respond to their offer to purchase because as of that date the Agency would be contractually required to purchase all of the property for the LLC. Pappas did not agree to the purchase of her property.

On November 19, 1993, the Agency filed a Complaint in Eminent Domain and a Motion For Order Permitting Immediate Occupancy Pending Entry of Judgment against the Defendants (hereinafter collectively referred to as Pappas). The action was then assigned to Department IX of the Eighth Judicial District. The Summons was not served on Pappas until December 8, 1993. Mrs. Pappas, an elderly widow, was served with the following documents:

1. A summons which stated that she had 30 days from the date of service to file an answer to the complaint

2. The Complaint

3. Notice of Motion for Immediate Occupancy

4. Renotice of Motion Permitting Immediate Occupancy

5. Notice of Lis Pendens

6. Affidavit of Tim Morse

7. Affidavit of Larry Barton

8. Plaintiff's First Set of Interrogatories to Carol Pappas. It should be noted that the service of interrogatories with a summons is prohibited by Nevada Rules of Civil Procedure 26 and 16.1

9. Plaintiff's First Set of Interrogatories to Harry Pappas

10. Plaintiff's First Set of Interrogatories to John Pappas

11. Plaintiff's First Request for Production of Documents to Carol Pappas. This document is also forbidden to be served simultaneously with the summons.

12. Plaintiff's First Request for Production of Documents to Harry Pappas

13. Plaintiff's First Request for Production of Documents to John Pappas

14. Ex parte Application for Order Shortening Time for Hearing of Motion for Order Permitting Occupancy Pending Entry of Judgment and Order Shortening Time.

15. Second Renotice of Motion For Order Permitting Occupancy Pending Entry of Judgment

Unbeknownst to Pappas, although her answer wasn't due until January 8, 1994, the Motion for Immediate Occupancy was to be heard on December 15, 1993. The Motion for Immediate Occupancy itself had conflicting dates of January 3, 1994, December 8, 1993 and the actual date of December 15, 1993. This was due to the fact that the Agency had previously sought an Order Shortening Time, but did not promptly serve it on Pappas. The Agency contended in its Ex Parte Motion for an Order Shortening Time and in its Motion for Immediate Occupancy that it needed access to the Pappas property because it needed to conduct environmental tests. At first, Pappas did not want to allow the Agency access to her property even for the environmental tests. But Pappas relented

and on December 14, 1993, she allowed the Agency to conduct the environmental tests. As a lay person, Pappas was under the impression that since the environmental inspection had taken place, there was no longer a need for the immediate occupancy. Pappas was incorrect in her belief. The Agency wanted the property immediately. The environmental survey was merely its stated reason for early occupancy. What the Agency really wanted was to start the building of the Fremont Street Experience.

What the Pappas Family had owned for nearly fifty years was stripped from them in less than 50 seconds in a summary proceeding on December 15, 1993 at which they were not even present. During that hearing, the Agency represented to the Judge that there was no opposition to the motion for immediate occupancy despite their knowledge that Pappas had no desire to sell her land and that she opposed efforts to take the property from her. The Agency failed to inform the Court of its having conducted the environmental study the previous day even though that was their stated purpose for the immediate occupancy. Stanley Parry, Esq., the attorney for Pappas at that time, on January 4, 1994, received notice of the entry of judgment granting immediate occupancy. On January 11, 1994 he filed a Motion for Reconsideration of the Motion for Immediate Occupancy. The filing was to no avail. On February 16, 1994, the Court denied the Motion for Reconsideration. The Pappas property was now in the hands of the Agency.

The Pappas filed a counterclaim to the complaint in eminent domain in which two of the causes of action revolve around the lack of due process in the initial motion for initial occupancy. The Agency moved for Summary Judgment on all six causes of action. On March 8, 1995, the Court granted

summary judgment as to both due process claims and denied summary judgment on the last claim. On the claims involving just compensation, the Court granted summary judgment to the extent that the claims exceed just compensation. Trial was then rescheduled for August 28, 1995 in Department IX. Pappas appealed the summary judgment decision to the to the [sic] Nevada Supreme Court and on January 25, 1996, the Supreme Court dismissed the appeal for lack of jurisdiction as the NRCP 54(b) certification was improper.

Pappas then obtained new counsel who objected to the trial judge because of his investment in one of the casinos in the LLC. Following the recusal of Judge Huffaker, the case was assigned to Department III. While the case was in Department III, Pappas, on December 11, 1995, filed a Motion to Dismiss Plaintiff's Complaint in Eminent Domain. The Agency exercised its right of peremption per SCR 48.1 and the case was then reassigned to Department XIII.

Beginning on February 28th, 1996 and continuing on June 5, 1996, the Court heard oral argument on the Pappas' Motion to Dismiss the Complaint. On February 28, 1996, the Court issued an order requiring additional briefing in order to receive as complete a record as possible to decide this issue. To that end, the Court, on April 8, 1996 granted the Motion to Intervene brought by the LLC.

At oral argument on June 5, 1996, the Agency was represented by Mark A. Wasser, Esq., Special Counsel to the Agency, by Bradley Jerbic, Esq. and Robert S. Sylvain, Esq. of the Las Vegas City Attorney's office and by Rex Jemison, Esq. and Daniel Polsenberg, Esq. of Beckley, Singleton, Jemison and List. The Pappas defendants were represented by Grant Gerber Esq. and Glade Hall, Esq. Adrienne LoBello was

represented by Bradley Ballard, Esq. The Court, having heard the arguments of counsel and having read the Points and Authorities and Supplemental Documents attached thereto, hereby enters its Decision and Order.

DISCUSSION AND HOLDING

Introduction

Pappas, in the Motion to Dismiss, alleges that the taking of their property by the Agency was done in violation of the United States Constitution, the Nevada Constitution and the Nevada Revised Statutes. Pappas alleges that the failure of the Agency to properly invoke the power of eminent domain deprives the Court of jurisdiction in this matter. Specifically, Pappas states that the failure of the Agency to follow the procedures outlined in NRS 279.382 through 279.685, both in the adoption of its redevelopment plan and as to the project that resulted in the taking of their property renders the Agency's actions null and void. Pappas further alleges that the Agency did not negotiate with the Landowners in good faith and that the Agency violated the Landowners' procedural due process rights.

The Agency takes the position that it should answer to no one as to whether it has complied with the statutes and its plan. The Agency argues that the role of the judiciary is limited to reviewing the Plan in terms of whether it was adopted in an arbitrary or capricious manner or in bad faith given the circumstances known to the City at the time. Plaintiff argues that the taking of the Defendants' property is prima facie valid and especially so because they were granted immediate occupancy and have already built the parking lot that is the redevelopment project. Plaintiff contends that since both the

United States and Nevada Supreme Courts have held that a taking of private property for redevelopment is a public use, then defendants have no valid constitutional argument. Plaintiffs also point out that the Nevada Revised Statutes also state that redevelopment is a public use.

In its original Opposition to the Motion, the Agency asserts that a Landowner may not exercise the right to judicial review except during the ninety days following the acceptance of the Plan. The Agency bases their position on the existence of a ninety day statute of limitations to challenge the plan (NRS 279.609) and on the conclusive presumption of validity found in NRS 279.589. The Agency does concede that no statute of limitations is available to bar the review of the 1993 taking of the Pappas property. The Agency further argues that there is no need for the Redevelopment Plan to be amended each time they adopt a project under the Plan. Lastly, the Agency contends that Pappas is estopped from bringing the Motion to Dismiss because Pappas waited until the parking lot was complete before bringing the Motion.

LLC, the Intervenor on the side of the Plaintiff, is more vociferous in its opposition to judicial review. In oral argument, the LLC espoused the view that the only proper function for the judiciary in this matter was the setting of "just compensation." The LLC, unlike the Agency, did not concede that the judiciary has a role in condemnation cases. LLC relied on conclusive presumptions and the statute of limitations in stating that the only portion of this case the Court must adjudicate is the amount of compensation to be given to Pappas. The Court will review each of these claims below.

JURISDICTION

_____Both the Agency and the LLC argue that the Motion to Dismiss is an improper reconsideration of both the Motion for Immediate Occupancy and the Motion for Summary Judgment on the Pappas counterclaims. The Eighth Judicial District court Rules (EDCR) prohibit reconsideration without leave of court and after ten days from the entry of judgment. [EDCR 2.24] Also, EDCR 7.12 prohibits multiple application to different judges of the same claim.

Pappas argues that the Motion to Dismiss is not a reconsideration of the previous motions, but is a new constitutionally-based challenge to the taking by the Agency. The Motion is based on a jurisdictional question which was not the focus of the other motions. Pappas asserts that even if the Court believed that the Motion to Dismiss constituted a reconsideration of the Motions for Summary Judgment, Pappas would still be entitled to be heard as the Summary Judgments must be set aside due to the conflict of interest of the Judge that issued the orders.

The Court agrees with Pappas that the Motion to Dismiss is not a reconsideration of the earlier decision. While there is some overlap in the lack of due process argument, the majority of this motion is focused on grounds other than those previously litigated by the parties. The Court finds that it has jurisdiction to hear the Motion to Dismiss. Since there is no reconsideration, the Court need not reach the issue of setting aside the prior summary judgment order.

CONSTITUTIONALITY OF THE TAKING

The Standard of Review

The Agency and LLC (hereinafter collectively referred to as Plaintiffs) argue that public use is a legislative determination and that the courts have only a limited role to play as to that determination. Pointing to *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L.E. 27 (1954) and *Urban Renewal Agency of the City of Reno v. Iacometti*, 79 Nev. 113, 379 P.2d 466 (1963) the Plaintiffs contend that the court is limited to the sole question of whether the Agency abused its discretion, or acted arbitrarily, or capriciously, or in bad faith, in the light of the information presented to it. Moreover, Plaintiffs further limit the scope of judicial review in redevelopment cases by stating that the ninety day statute of limitations provided by NRS 279.609 precludes the courts from even conducting the limited review outlined in *Iacometti.* Plaintiffs also point to NRS 37.010(17) wherein the legislature has declared that redevelopment is a public purpose. The Agency does contend that the Court may review the taking of the Pappas property in 1993 as the ninety day statute of limitations is inapplicable due to the decision of the Agency not to amend the Redevelopment Plan to include the Fremont Street Experience.

Pappas contends that this Court has the right, in fact, the obligation, to strictly enforce the constitutional requirements of eminent domain cases. Pappas concedes that the United States Constitution (Fifth and Fourteenth Amendments) and the Nevada Constitution (Article 1, Sec. 8) both allow the Government to take private property provided that the property is taken for "public use" with "just compensation" and in accordance with procedural due process. Pappas contends that

the Courts in *Berman* and *Iacometti* as well as in several other cases cited by Plaintiff, including *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), have all made a very careful analysis both of the project and of the procedural and statutory requirements involved prior to granting legislative deference. Further, Pappas points to the language of *Berman*, at p. 32 wherein the United States Supreme Court states: "*Subject to specific constitutional limitations*, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." [emphasis added] and to the language of the Nevada Supreme Court in *Schrader v. Third Judicial Dist. Court*, 58 Nev. 188, 195; 73 P.2d 493 (1937):

> "When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, *when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance."* (emphasis added)

as proof that the Court may make inquiry into constitutional claims and that one such claim is whether the sovereign has fulfilled the conditions of the exercise of its power. Pappas states that in this case, the Court must review the condemning agency's compliance with all statutory provisions. Condemnation is a constitutionally sensitive proceeding that

requires strict compliance with the Constitution and all statutes. Therefore, the statutes must be strictly construed in favor of the landowner and against the condemning party. *City of Cincinnati v. Vester*, 281 U.S. 439, 50 S. Ct. 360 (1930).

The Urban Renewal Cases

Both *Iacometti* and *Berman* are urban renewal cases and not redevelopment cases. There are important distinctions between the Urban Renewal Law (NRS 279.010 through 279.380) and the Community Redevelopment Act (NRS 279.382 through 279.685. The urban renewal law required that land could only be acquired after approval by the voters. (NRS 279.270 (5)) Once approved, eminent domain could be used to the full extent permitted under Chapter 37 of the Nevada Revised Statutes. (NRS 279.290) Any land acquired by the municipality could only be transferred to a private entity in a competitive bidding process (NRS 279.300(2)) and only if the private entity agreed to use the land in accord with the renewal plan (NRS 279.300 (1)). Lastly, the municipality is responsible for initiating the judicial review process in order to insure the trustworthiness of its bonds and the regularity of its proceedings in the acquiring of the area within the plan. (NRS 279.311) If there is no challenge to the plan during the proceedings or the plan is found valid then the plan is conclusively valid for all purposes. (NRS 279.318)

The Community Redevelopment Act (Act) is designed for the redevelopment of blighted areas without a direct vote of the electorate. The Act is a statutory creation that requires the municipality to follow a series of steps to designate which areas are blighted and subject to redevelopment. From the creation of the Agency (NRS 279.426-428) to the subject findings required by the City Council (NR8 279.586) to the specificity

of the Plan (NRS 279.572), the Redevelopment Act requires strict compliance with the statutes in order to function. Nor does the Act provide for the unrestricted use of eminent domain.

Specifically, NRS 279.424(2) allows the use of eminent domain only when:

> "the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated."

Lastly, NRS 37.010(17) which provides the Agency with the power of eminent domain and designates redevelopment as a public use specifically states that redevelopment is a public use only as to the acquisition of property pursuant to NRS 279.382 to 279.685, inclusive.

Unlike an Urban Renewal Plan, which has been subjected to numerous checks and balances by a public vote and the judicial review process, a Redevelopment Plan is not subjected to any external verification of compliance. The only safeguard in a redevelopment plan is the assurance of strict compliance with the legislative mandate. At the very least, it is incumbent upon a court to ascertain compliance with the

statutes that created the Agency and establishes its authority. This is especially true in the case of eminent domain as the Agency has no power except that conferred to it by the Legislature. *Schrader v. Third Judicial Dist. Court, supra.* The failure to follow the Legislative intent invalidates any act in that it exceeds the authority of the entity to act. *Southern Nevada Homebuilders Association, Inc. v. City of North Las Vegas*, 112 Nev. Adv. Opinion 42, No. 26062 (1996).

It is the province of the judiciary to determine if the municipality has complied with the legislative intent and not for the municipality to self-validate.

In *Iacometti*, the Nevada Supreme Court stated that the trial court could not engage in a trial de novo but rather was to review the agency's actions. The Court held that:

> "In each instance the court's inquiry is limited to the record of information presented to the governmental body. The court's purpose is to ascertain whether, upon such information, that body acted arbitrarily, capriciously, and abused its discretion. Thus, a trial court should sustain discretionary action of a governmental body, absent an abuse thereof, to the same extent that an appellate court upholds the discretionary action of a trial court." (citations omitted)

Because of the differences between the Urban Renewal Law and the Community Redevelopment Act, the Court finds that *Iacometti* and *Berman* are not the complete standard in regard to Community Redevelopment projects. While the Court may not substitute its opinion for that of the legislative body as to questions of fact, Community Redevelopment, which is

dependent upon strict statutory compliance to empower the agency, must have its compliance verified by the judiciary. The standards to be applied to the Community Redevelopment Act are analogous to those applied by the Courts as to the review of other administrative agencies. The Legislature in 1989 codified this standard as NRS 233B.135(3)[2]. While NRS 233B.135 does not directly apply to NRS Chapter 279, the Court finds that the language of NRS 233B.135(3) adequately captures the proper standard of review in a Community Redevelopment situation where compliance with the statutes is essential to the exercise of the Agency's power.

Thus in addition to the arbitrary and capricious standard of *Iacometti*, the Court finds that it must also ascertain strict compliance with the enabling statutes when reviewing the actions of the Redevelopment Agency.

The Ninety Day Statute of Limitations

Plaintiff's would have this Court precluded from review of its actions even under the *Iacometti* standard on the basis that Pappas may not question the 1986 Plan under which their

---

[2]The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse of discretion.

property was condemned. Plaintiff's argue that NRS 279.609 allows only a ninety day statute of limitations in which a party may challenge the plan. Further, the Plaintiffs cite NRS 279.589 which they allege is a conclusive presumption in favor of the Agency as to the Plan they develop. In support of the validity of the ninety day limitation, Plaintiffs cites *Palva v. Providence Redevelopment Agency*, 356 A.2d 203 (R.I. 1976) and *Redevelopment Agency v. Del-Camp Inv. Inc.*, 113 Cal. Rptr. 762 (1974). In each of these cases, the court held that its respective statute of limitations was an applicable bar even as to constitutional challenges. The Agency contends that the Court may not therefore review the validity of the 1986 Plan. However, the Agency also concedes that the ninety day limitation does not apply to the taking of the Pappas property because they chose not to amend the Plan.

Additionally, the Agency believes that the ninety day statute is necessary due to the issuance of redevelopment bonds. Plaintiffs maintain that the integrity of the bonds would be questioned if a challenge were allowed.

Pappas counters this claim by bringing to the Court's attention that the bonds are tied to the hotel tax rate and not to any particular development. In fact, in the case of the Fremont Street bonds, the issue date was 1995 and not 1986. Why then would a ninety day limit be necessary? Pappas argues that the Constitution of the United States and of Nevada may not be abridged by a conclusive presumption of the Legislature. To allow such an interpretation would mean that the Constitution of both the state and federal governments could be amended by the statutes of one legislature. Such an interpretation is inconsistent with the laws of this country and would result in a denial of due process to Pappas. Moreover, in order for the presumption to be applicable, the City must have provided

proper notice and complied with all of the applicable redevelopment statutes. The Plaintiff would in effect give itself license to violate all of the statutes and the constitutional rights of the citizenry of Las Vegas and as long as no one noticed the violations within ninety days, the Plaintiff would not be held to answer. Lastly, Pappas points to the fact that this is not an action brought by them against the Plan, but rather it is a defense to the action in eminent domain. Pappas argues that the NRS 279.609 bars any actions questioning the validity of the plan but that it says nothing about defenses to actions brought by the Agency.

NRS 279.589 reads as follows:

> 1. The decision of the legislative body concerning a redevelopment area is final and conclusive, and it is thereafter conclusively presumed that the redevelopment area is a blighted area and that all prior proceedings have been properly and regularly taken.
>
> 2. This section does not apply in any action questioning the validity of any redevelopment plan, the adoption or approval of the plan, or any of the findings or determinations of the agency or the legislative body in connection with that plan brought pursuant to NRS 279.609.

The Court first notes that the presumption in NRS 279.589(1) refers to the validity of the redevelopment *area* and not to the redevelopment *plan*. In addition, the presumption is not

applicable when the challenge to the plan is brought pursuant to NRS 279.609. Plaintiffs concede that they did not amend the Plan at the time of the condemnation of the Pappas property and therefore, Plaintiffs are not entitled to the protection of the statute of limitations on actions against the Plan. Since Plaintiffs acknowledge that Pappas may challenge the Plan at least as to the Fremont Street Experience under NRS 279.609, then the presumption under NRS 279.589 is not applicable to this action. As the Agency is not entitled to presumption under NRS 279.589(2), there is no bar to the Court's review of the Agency's compliance with the statutes and of the activities taken in regard to the adoption of the Plan.

Additionally, the Court relies on the reasoning of the California Court of Appeal in case of *Redevelopment Agency of the City of Fresno v. Herrold*, 150 Cal. Rptr. 621, 825 (5th Dist. 1978) in finding that the ninety day statute of limitations does not serve as a bar where a landowner questions the implementation of a Plan in connection with his property. In *Herrold*, the landowner sought to challenge the taking of his property on the basis that there was no public use shown by the Agency. The Agency raised as its defense the sixty day statute of limitations. The trial court agreed and applied the ban on the landowners claim. The Court of Appeals reversed stating:

> "The sixty day limitation period in Section 33500 does not apply to the type of challenge that appellant is making here because he is not attacking the legality of the redevelopment plan as originally adopted, but is questioning the implementation of the plan with respect to his property. Appellant had no reason to object when the plan was adopted. It was not apparent at that time that the agency might be

> deviating from its resolved purpose and planning an illegal use of the property until eight years after the plan's adoption. Section 33500 cannot be used to immunize an agency which adopts a redevelopment plan legal on its face, then after the sixty day period has lapsed deviates from its resolved purpose and seeks to violate the public use requirement of the California Constitution, Article I, Section 14, and the Fourteenth Amendment to the United States Constitution. Section 33500 applies only to attacks on the redevelopment plan as adopted and not to actions alleging illegal implementation of the plan."

Further, the Court finds that NRS 279.609 is not applicable to bar a defense when the Agency has commenced an action in eminent domain. Nothing in Chapter 279 prohibits a property owner from raising constitutional claims in defense of a taking. NRS 279.609 specifically refers to bringing a challenge to the Plan within ninety days. Plaintiffs urge this Court to adopt the reasoning in *Pavia* and *Del Camp* and hold that redevelopment is somehow entitled to a "super deference" status. This deference should take priority over the rights of citizens under the Constitution. No one should be allowed to challenge the Agency Plan after ninety days for any reason.

The Court understands the importance of the goal of economic revitalization, however, it declines to adopt as the policy of the State of Nevada the abrogation of the rights of the people of this State in favor of this goal. The Constitution of the United States and of the State of Nevada apply to redevelopment as well as to any other taking of property. The Court does not find an exception within NRS Chapter 37 that

states that redevelopment is not subject to the same challenges as the sixteen other legislatively declared public purposes within NRS 37.010. As such, the people of this state are entitled to the protections of our Constitutions whether their property is taken for a freeway or an Agency parking lot.

The Court finds that Due Process does not allow the rights of individuals to expire nearly a decade before the individual is affected and therefore the ninety day statute of limitations does not serve as a bar in this case.

Public Use

Pappas first objection to the taking of the property is that the Agency has violated NRS 37.040.[3] Pappas points to the Complaint and to the Motion for Immediate Occupancy and states that neither document sates the public use of the taking. Since the Agency obtained the properties without complying with the statute, the taking is unconstitutional. There is no constitutional provision allowing the taking of private property for private use. Pappas insists that a mere recital of the use, such as in Larry Barton's affidavit, that a property is needed to fulfill the Agency's contract with a private company is not

---

[3]NRS 37.040

Conditions precedent to entry of judgment of condemnation; findings.

No judgment of condemnation shall be entered unless the court first finds that:

1. The use to which the property is to be applied is a public use.
2. The property is necessary to such public use.
3. If the property is already appropriated to some public use, the public use to which it is to be applied is a more necessary public use.

proof of a public use as is required by the statutes and the Constitution. Moreover, Pappas asserts that since their property was taken by a private entity merely masked in the cloth of the Agency, this was a private taking which is not authorized by the statutes. Pappas insists that the LLC was in complete control of the Agency. It is the LLC that retains control of the amounts of just compensation offered to landowners in connection with their property. It was the LLC manager, Don Snyder, who informed the *landowners* that "participation as landowners in the Fremont Street Experience will not be permitted".[sic] In short, this is an unauthorized private use of the power of eminent domain. It is the LLC that is directing this litigation and it is the LLC that will reap the benefits of the retail space that will replace the Pappas retail space. Defendants also allege that if retail outlets in a redevelopment area are a public use, then they too qualify as a public use. If their property was devoted to a public use, then in accordance with the Nevada Supreme Court's decision in *NL Industries v. Eisenmann*, 98 Nev. 253, 645 P.2d 976 (1982) they are entitled to equal deference to their property rights and thus their property may not be taken.

Plaintiffs point out the NRS 37.040 refers to findings that a Court must make prior to entering the condemnation decree and not as to the granting of a motion for immediate occupancy pursuant to NRS 37.100. Since the Pappas property has yet to be condemned, the findings have yet to be made. As to the matter of the ownership of the garage, the Agency is empowered to enter into contracts with private landowners to advance redevelopment. NRS 279.462. Lastly, the Plaintiffs dispute the relevance of *NL Industries* to this case. Plaintiffs attach the affidavit of Robert Sylvain attesting to the fact that there will not be any retail use of the Pappas property at the garage site. Thus, they argue, since the Pappas property itself

will not be used for retail space, there is no issue of "same" public use.

The Court agrees with the Plaintiffs that NRS 37.040 refers to the findings that the Court must make prior to entering a judgment in [sic] condemnation case and that in fact, such a finding is premature. The Court also finds that NRS 37.100 is not a final order of condemnation and thus an order pursuant to NRS 37.040 need not be entered. Additionally, since possession pursuant to NRS 37.100 is not a final judgment [see NRS 37.009(2) & (3)] and since NRS 37.100(4) calls for a waiver of defenses only as a condition of receipt of the monetary deposit, a defendant retains all defenses to the condemnation. The plaintiff who utilizes NRS 37.100 assumes the risk that a court may find that the taking does not meet constitutional standards. *Schrader v. Third Judicial Dist. Court, supra.* Despite the possession of land allowed under NRS 37.100, title may only pass after a finding of public use pursuant to NRS 37.040.

The underlying question in this Motion to Dismiss is whether this taking is for a public use. The Court does not dispute that redevelopmant is a public use. The Courts have long held that redevelopment is within the police powers of the Legislature. Eminent domain has also been upheld as a tool that may be used by the Legislature in its redevelopment efforts provided that all Constitutional requirements are met. *Hawaii Housing Authority v. Midkiff, supra.* In Nevada, the Legislature has specifically declared redevelopment to be a public use but *only* in compliance with NRS 279.382 through 279.685. It is clear that where a redevelopment plan is property drafted and executed, then property within the plan may be condemned as being taken for a public use. It is also within the authority of a Redevelopment Agency to contract with private entities to

engage in redevelopment. However, there are limitations on the use of eminent domain for private landowners which will be discussed later in this decision. Prior to determining whether this taking qualifies as a public use of property the Court will comprehensively analyze the statutes below.

As to the matter of "same public use", the Court cannot adopt the position of the Plaintiffs on this issue because the record does not support the Plaintiff's contention. The April 26, 1993 letter from Executive Director William Noonan to Pappas specifically states that the "proposed project is to develop the Project Area into a 1,500 space parking garage with a limited retail on the ground and possibly second levels." Recently, it has also been reported in the press that the signing of the leases for the retail space is eminent. It is clear that the garage will, in fact, include retail space.

The Plaintiffs seek to draw too fine a line in this circumstance. The affidavit states that the *Pappas* property will not be used for retail space, but it does not deny that there will be retail space on the premises. Where the use of the parcel is for the same purpose as the previous use, the specific configuration of the property does not work to deny the applicability of *NL Industries v. Eisenmann, supra.* To hold that the configuration is critical to the use of "same public use" would be to open the gates to the manipulation of architectural drawings that could be changed after the judicial proceedings.

The public use in *NL Industries*, is mining. One mining company sought the assets of another mining company. The Court, quoting J. Sackman, *Nichols Law of Eminent Domain*, Sec. 2.2[9] held that:

"Property of a private corporation devoted to a

> public use, although not clothed with a specific exemption from subsequent condemnation, cannot be taken to be used in the same manner for the same purpose by a different corporation, even by express enactment of the Legislature."
>
> *Id.* at p. 258.

In this case, one "retail business" seeks the assets of another "retail business". If both constitute public uses, the Court would be required to apply *NL Industries*. The Court need not reach this question until the public use has been established.

COMPLIANCE WITH THE STATUTES

Compliance with the statutes is essential in order for the Agency to be vested with the power of eminent domain. The Agency is not the sovereign that is entitled to eminent domain. That authority rests in the State. The State may and has the right to designate who may use that power and under what conditions they may do so. Failure to follow the conditions results in an inability to exercise the sovereign's power. *Schrader v. Third Judicial Dist. Court, supra.* Thus, if the Agency does not have the power to exercise eminent domain, then the Court does not have the jurisdiction to grant the complaint in eminent domain.

THE 1986 PLAN

Pappas contends that the Redevelopment Plan of 1986 that the Agency purports to operate under is fatally flawed in that it does not exist. Firstly, the City failed to determine that the Pappas property was in fact blighted, as they did not even assess the block in any manner. Pappas points to the fact that

the Court specifically required the Agency to produce the study or survey done to prove blight. The Agency did not produce one report that the showed that the block upon which the Pappas property is situated was ever surveyed, let alone blighted. Pappas asks the Court to find pursuant to NRS 47.250(3), that such evidence, has been willfully suppressed and thus would be adverse if produced. None of the Agency's block surveys found blight and the property directly surrounding the Pappas block were hotels that the survey described as "major hotels. O.K." The only other documents produced by the Agency are the Housing Code Surveys that cover an area far from the Pappas property.

The plan was not based on empirical data; instead it is a hollow shell merely mimicking the words of the enabling statutes. There was not a survey of Las Vegas which revealed the blighted areas. The City targeted an area and then adopted that area as the redevelopment area with only minor adjustments. Unlike the case in *Iacometti*, were the City of Reno took two years in developing its program, the Las Vegas Agency rushed through the entire "plan" within two months. This lack of documentary support makes the findings unreliable, arbitrary and violative of the statutes.

Secondly, Pappas argues that the Agency may have adopted a map, but that it did not adopt a plan because it did not comply with the specificity requirements of NRS 279.572. NRS 279.572 is very specific in that every redevelopment plan must show the amount of open space, the layout of the streets, etc.[4] The Plan adopted in 1986 could not and did not lay out

---

[4]279.572 -- General requirements for contents of redevelopment plan; requirement for employment plan.

any of these items. The Plan generally touches on these matters, yet clearly until a specific project is entered into, there can be no specificity. The Plan does not show the number of residences, the layout of the streets or where public facilities will be located. Pappas claims that the lack of specificity was known to the City even at the time of the hearings. The evidence is in the February 19, 1986 hearing before the City

---

1. Every redevelopment plan must show:

(a) The amount of open space to be provided and the layout of streets.

(b) Limitations on type, size, height, number and proposed use of buildings.

(c) The approximate number of dwelling units.

(d) The property to be devoted to public purposes and the nature of those purposes.

(e) Other covenants, conditions and restrictions which the legislative body prescribes.

(f) The proposed method of financing the redevelopment plan in sufficient detail so that the legislative body may determine the economic feasibility of the plan.

2. As appropriate for the particular project, each proposal for a project must also include an employment plan. The employment plan must include:

(a) A description of the existing opportunities for employment within the area.

(b) A projection of the effect that the redevelopment project will have on opportunities for employment within the area.

(c) A description of the manner in which an employer relocating his business into the area plans to employ persons living within the area of operation who are:

(1) Economically disadvantaged.
(2) Physically handicpped.
(3) Members of racial minorities.
(4) Veterans.
(5) Women.

Council. Over and over the government officials kept stating that they had no idea what would actually be done until a developer came forward. There is nothing contemplated except having an area where the Agency could freeze the tax base and obtain funds for its existence. Pappas contends that it is this lack of any substance to the plan that led to persons being unable to challenge the Plan as there was nothing within the Plan that could effect anyone. Furthermore, the citizenry has a right to rely on the representations of its elected leaders.

Pappas adds that the statutes also call for public hearings and for the legislative body, the City Council, to hold such hearings at which "any person (may speak) having an objection to the proposed redevelopment plan or who denies the existence of blight in the proposed redevelopment area or in the regularity of any of the proceedings".[5] It is the legislative

---

[5]NRS 279.580. Matters to be considered by legislative body; public hearing; notice.

1. The legislative body shall consider the redevelopment plan submitted by the agency and all evidence and testimony for or against the adoption of the plan at a public hearing, notice of which must be given by publication for not less than once a week for 4 successive weeks in a newspaper of general circulation published in the county in which the redevelopment area is located.

2. The notice of hearing must include:

(a) A legal description of the boundaries of the area designated in the redevelopment plan;
(b) A general statement of the scope and objectives of the plan; and
(c) A statement of the day, hour and place where any person;
(1) Having an objection to the proposed redevelopment plan; or
(2) Who denies the existence of blight in the proposed redevelopment area or the regularity of any of the

intent that there be public comment and due process in these proceedings as provided by the mandatory hearings of NRS 279.608.[6]

---

proceedings, may appear before the legislative body and show cause why the proposed plan should not be adopted.

3. Copies of the notice must be mailed to the last known owner of each parcel of land in the area designated in the redevelopment plan, at his last known address as shown by the records of the assessor for the community.

[6]279.608 - Amendment or modification of redevelopment plan: Heading; notice; report of planning commission.

1. If at any time after the adoption of a redevelopment plan by the legislative body, it becomes necessary or desirable to amend or modify the plan, the legislative body may amend the plan upon the recommendation of the agency. An amendment or modification may include the addition of one or more areas to any redevelopment area.

2. Before recommending amendment of the plan the agency shall hold a public hearing on the proposed amendment. Notice of that hearing must be published at least 10 days before the date of hearing in a newspaper of general circulation, printed and published in the community, or, if there is none, in a newspaper selected by the agency. The notice of hearing must include a legal description of the boundaries of the areas designated in the plan to be amended and a general statement of the purpose of the amendment. Copies of the notices must be mailed to the last known owner of each parcel of land within those boundaries, at his last known address as shown by the records of the assessor for the community, and to any person who has acquired property within those boundaries from the agency, at his last known address as shown by the records of the agency.

3. If after the public hearings the agency recommends substantial changes in the plan which affect the master or community plan adopted by the planning commission or the legislative body, those changes must be submitted to the planning commission for its report and recommendation. That report and recommendations [sic] must be given to the legislative body within 30 days after that submission.

The Agency disagrees with the characterization of its Plan as a mere recitation of the statute. The Agency points to the staff report with its crime statistics that show crime as being higher in the targeted area than in the rest of the city and to the block surveys that were completed. Plaintiffs make no comment as to the quality of those surveys. Plaintiffs [sic] argument in this respect rest [sic] on the presumption of all proceedings having been regularly taken per NRS 279.589. Plaintiffs are of the opinion that since the statute of limitations has run, the Court may not review the findings of the City.

Plaintiffs also believe that they need not amend the Plan. They claim that the legislature has left the decision to amend up to the Agency. Plaintiffs cite the following language as allowing the Agency to decide whether they will amend the Plan and provide for the hearings required in NRS 279.608:

> "If at any time after the adoption of a redevelopment plan by the legislative body, it becomes necessary or desirable to amend or modify the plan, the legislative body may amend the plan upon the recommendation of the agency. An amendment or modification may include the addition of one or more areas to any redevelopment area."

Plaintiffs argue that they have only amended the Plan in 1988

---

4. After receiving the recommendation of the agency concerning the changes in the plan, the legislative body shall hold a public hearing on the proposed amendment, notice of which must be published in a newspaper in the manner designated for notice of hearing by the agency. If after that hearing the legislative body determines that the amendments in the plan, proposed by the agency, are necessary or desirable, the legislative body shall adopt an ordinance amending the ordinance adopting the plan.

to add the Westside into the redevelopment area and to conform the Redevelopment Plan to the General Plan in 1992 although they have funded a variety of projects under the Plan. The Plaintiffs also submit affidavits of persons employed by other Nevada Redevelopment agencies that also claim not to amend their plans for new developments. Plaintiffs then point to the 1985 amendments to the Redevelopment Act which they state prove that the legislature meant for there to be hearings for the "plan" only and not for the "projects." The Plan, they contend, was meant to be general and to last for thirty years. The Agency does concede, that, should they choose not to amend, a defendant may challenge the implementation of the Plan. Lastly, Plaintiffs maintain that the Agency sent out the required notice of public hearing in January of 1986, that an appropriate hearing was held and a final plan adopted.

The Agency has provided a copy of all of the aforementioned at the request of the Court. The record shows that the blight surveys were incomplete. No survey was completed in its entirety. Not one survey indicated whether the property was blighted or non-blighted. What is clear is that the surveys were obviously not completed in a serious manner. It is difficult to imagine what useful information could be gleaned from these surveys that would have allowed Agency staff to determine what portions of the City or even of the survey area should be included within the redevelopment area. As the Pappas block was not even surveyed, it is clear that the survey was conducted in a haphazard way. While the Court is curious to know why the redevelopment area would include the hotel-casinos that the Agency's own surveys had declared to be in good condition, the Court will not inquire as to whether a particular block should have been included in the redevelopment area. That question is the prerogative of the municipality. Rather the Court's focus will be as to whether

the City had adequate information to make a finding of blight as to the redevelopment area or if the designation of the area was arbitrary and capricious.

The Court, in an effort to secure a complete record, asked the Agency to provide all of the empirical data the agency relied on to designate the redevelopment area. The block survey, the housing code survey and the staff report constitute the record in this case. After reviewing the documentation, the Court agrees with the Defendants that the Agency merely took the statutes and constructed them into a plan. The block surveys indicate the lack of information gathered by the Agency. The Agency simply designated an area of the City as subject to redevelopment and then wrote a report that would satisfy the statutes by incorporating the language of the statute as evidence. The Agency, the Planning Commission and the City Council must all pass upon this Plan yet not one of these entities inquired as to the factual findings for their resolutions. It is important to note that the Agency and the City Council are one and the same. It is obvious therefore that they were aware of the lack of empirical evidence to confirm their actions. The failure to obtain evidence prior to the confirmation of the redevelopment area, which was known to all three entities at the time of the approval of the plan, lead to the area having been designated in an arbitrary and capricious manner and as such the municipality's actions are violative of the statutes. The Court finds that there was not substantial evidence to support the findings of the Agency, the Commission and the City Council.

The Court has reviewed the January 27, 1986 letter to the landowners and finds that the letters sent to the citizens living in the targeted area were inadequate as they did not comply with NRS 279.580(2)(c)(2). The letters did not make

the landowners aware of their right to question the inclusion of their property as blight nor of their right to question the regularity of the proceedings. The January 27, 1986 letter did not even inform the landowner [sic] that their property had been deemed blighted. The City was aware of the requirement of the strict compliance needed in this process as evidenced by Mayor Briare's comment that the "City is required, of course, to follow the State Law, and because of the significance of this hearing this afternoon, we're going to follow the State Law to the letter." [HT, p. 1] The letter did not contain the required language and did not inform the citizen of what the definition of blight was. The only mention of blight was in the attachment entitled Notice of Public Hearing on the Redevelopment Plan for Downtown Las Vegas Redevelopment Area. The attachment mentions that a goal of redevelopment is the elimination of blight. The Court therefore finds that the statute was violated and the notice was inadequate. The Court further finds that the Agency was aware in 1986 of the requirement of the statutes especially as they has [sic] proposed the amendments in 1985 to NRS 279.580. As such, the failure to mail the appropriate notice of hearing was a violation of state law.

As to NRS 572.608, the Court finds that the Agency is not given a choice as to whether it will amend the Plan for each new project. The Legislature has deemed that the plan will be amended. The Plan requires specificity under NRS 279.572 including an employment plan. This can only be achieved if the various "projects" are brought into the Plan. The fact that the Agency "may amend" as stated in NRS 279.608(1) is meant to convey the Agency's ability to amend. It does not signify a choice. The fact that the legislature specifically states in NRS 279.608(1) that there is a distinction between when it is necessary to amend a plan and when it is desirable to do so

indicates that the Legislature required the Plan to be amended under certain circumstances. The required circumstance is the obtaining of the specific information under NRS 279.572. When the Agency has obtained the information allowing them to state the street layout, dwelling units, the employment plan, then the Agency is required to amend the plan and conduct hearings in accordance with NRS 279.608. Such a public hearing with *specifics*, would then give rise to the ninety day statute of limitations contemplated in NRS 279.609. There is no other provisions that would trigger the requirement to amend the Plan. The remaining language of NRS 279.608(1): "An amendment or modification may include the addition of one or more areas to any redevelopment area" indicates that the Agency is given permission to add additional areas to the redevelopment plan, however, they are not required to do so.

The Court also looks to NRS 279.468[7] which specifically empowers the Agency from time to time to prepare *plans* for the improvement, rehabilitation and redevelopment of blighted areas. The Legislature uses the words "plan" and "project" interchangeably. In direct contrast to the position that the Agency currently takes, in 1985 at the time of the amendment of the Redevelopment Act, the Agency admitted

---

[7]279.468 - Preparation of plans; acceptance and expenditure of money.

An agency may:

1. From time to time prepare plans for the improvement, rehabilitation and redevelopment of blighted areas.

2. Disseminate redevelopment information.

3. Accept financial or other assistance from any public or private source, for the agency's activities, powers and duties, and expend any funds so received for any of the purposes of NRS 279.382 to 279.680, inclusive.

that there was *no* distinction between these two words. Specifically, Mr. Ferguson, on behalf of Las Vegas, the sponsor of the SB 474, testified that: "the distinction between "project" areas and "redevelopment" areas, which exist in the current law are [sic] eliminated. It's not altogether clear under the current law what the difference is between a "redevelopment" area and a "project" area. It is, however, clear that the distinction serves no useful purpose."

The City may not now deny that there is no distinction between a project and a plan. Each new project requires specificity and an amendment to the Plan. The City of Sparks Redevelopment Plan contains such specificity despite the affidavit proffered to the contrary. The Court notes that the Agency staff itself, in its report to the City Council, refers to the Fremont Street Project as "the *Redevelopment Plan* that you will consider on October 20, 1993."

The Agency's argument that the Plan must be general because it will last for thirty years is a misstatement. Pursuant to NRS 279.438 and 279.439 it is the Agency and *not* the Plan that lasts for thirty years or until the redevelopment bonds are paid in full. Moreover, even if the Plan was to last for thirty years, the amendment process outlined in NRS 279.608 would still require amendments to the Plan.

Moreover, it is doubtful that the Legislature envisioned no public input into the expenditures of public funds. Under the Agency's scenario, the only public input is to occur at the initial hearing and at no other time even if the Plan is twenty-five years old. The Agency then negotiates a secret deal with whomever seeks their services. Thereafter, the procedure would be as follows: the City Council sits as the Agency and approves a Redevelopment Project in the morning. At Noon,

the Planning Commission, which is comprised of appointees of the City Council, approves the Project and in its afternoon session, the City Council, now sitting as themselves, gives final approval to the Project. The public that attends the City Council meeting on a regular meeting notice are the only ones who may comment.

These decisions result in the taking of private property. The persons who will be affected have a right to notice prior to the implementation of a Plan as well as the right to petition their government. In criminal law, a person who is the subject of a grand jury indictment is entitled to notice in advance as to the time, place and date of the meeting of the grand jury so that he may present exculpatory evidence *prior* to the indictment issuing. *Sheriff v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989). Failure to give such notice is grounds for the dismissal of the indictment. It is of no consequence that the indictment is not a conviction and that there is a right to trial. A person is allowed to present exculpatory evidence *prior* to the expense and risk of a trial. Doesn't a citizen in the civil arena deserve the same right to notice and to present evidence as to why his property should not be included in any plan? A complaint in eminent domain is not a condemnation and of course, there is a right to trial. Should not the citizen landowner be allowed to present evidence *prior* to the expense and risk of trial? NRS 279.608 is meant to provide such notice and to safeguard the rights of citizens to present such evidence. Perhaps it is not by coincidence that both the right to a grand jury indictment and the limitation on the taking of property to takings for public use and with just compensation are both found in the Fifth Amendment to the United States Constitution and in Article I, Section 8 of the Nevada Constitution.

The Agency admits that it did not amend the Plan to

include the Fremont Street Experience (or any other project) nor did it hold hearings and provide the requisite notice to landowners as to that hearing. The Agency has not stated how this occurred in the case of a plan that closed streets thus changing the configuration of their original plan.

The Court finds that the failure to amend the Plan and hold the required hearings renders the Agency without authority to condemn and the Court without jurisdiction to entertain their Complaint in eminent domain.

NRS 279.424

Pappas asserts that in addition to the other statutory violations committed by the Plaintiffs that the Agency is without the ability to condemn due to the failure of the Agency to comply with NRS 279.424(2). Pappas argues that the Legislature's declaration of public policy in NRS 279.424(2) requires the Plaintiffs to show that they were unable to obtain the Pappas property by any other means. Defendants point to the net worth of and the investments in real property and gaming made by the eight hotel-casino members of the LLC. Since these entities had the ability to pay for the property and negotiate fairly for it, then the statute states that they must do so prior to the exercise of eminent domain.

The LLC argues that this is not a statutory requirement as it is only a statement of public policy. The Agency has not directly addressed this argument.

The Court finds that it was the intention of the Legislature to allow the private sector to participate in redevelopment without the use of the Redevelopment Agency and its power of eminent domain. The Legislature anticipated

the use of zoning laws and planning commission decisions to advance redevelopment and to allow for the elimination of blight. NRS 279.424(2) specifically points to the fact that the Legislature expected the redevelopment to be accomplished by the private sector alone and only granted the Agency the power of eminent domain when the private sector could not act alone. The Court finds that compliance with the public policy enunciated in NRS 279.424(2) is a condition precedent to the exercise of eminent domain. The Agency acknowledges this condition in its own Plan at Section 430.10 which states in pertinent part:

> "It is in the public interest and is necessary, in order to eliminate the conditions requiring redevelopment and in order to execute this Plan, for the power of eminent domain to be employed by the Agency to acquire real property in the Redevelopment Area, which cannot be acquired by gift, devise, exchange, purchase or other lawful method."

There has been no showing by the Agency that the Downtown Casinos of the LLC could not have purchased the properties they desired through the payment of fair market value. Neither the Agency nor the intervenor, LLC, presented a single letter showing any "hold out landowners" or offers rejected. In fact, no offers were ever extended to the landowners by the LLC. The entire Fremont Street package was premised on the Agency obtaining the Land through eminent domain despite the representations made to the Legislature by the City at the time of the passage of the Pedestrian Mall Act. Two days after the lobbyist for the City testified that the "City would do everything possible not to use these means" [eminent domain] and that the Agency was

negotiating with the Landowners who wanted to participate, the City passed its resolution of need and necessity to take the Pappas property. There was not even the pretense of a negotiation with the landowners. In contrast, Pappas presented evidence of the worth of the members of the LLC and of the other projects that they were able to fund. Without a showing that the LLC could not accomplish this project without the use of eminent domain, NRS 279.424(2) is not available for the Agency's use. The statute anticipates proof of true inability to proceed and not just a request that the Agency assist a private landowner to obtain land from his neighbor against his will and without negotiations. The takings clauses of the United States and Nevada Constitutions do not envision the Government as the transfer agent between two private landowners.

The Court finds that the Agency was not authorized to use eminent domain in this case and any attempt to do so without compliance with the statutes is null and void.

Owner Participation

Pappas alleges yet another violation of rights under the statutes. NRS 279.488 and NRS 279.566 gives [sic] property owners the right to participate in redevelopment. The Agency was aware of this requirement as Pappas received a letter dated April 26, 1993, from Executive Director William Noonan that invited landowners to submit an alternative proposal by May 28, 1993. This letter gave Pappas only thirty days to complete a thirty-day five item proposal sheet. On May 19, 1993, Pappas responded to the letter informing the Agency of her desire to participate in the development of the parking lot by entering into a long-term lease with the City and her lack of interest in selling the land. That letter was specifically submitted as an alternative proposal in response to the Agency's solicitation of

same. Pappas did not receive a response to the April 19, 1993 letter nor was the Pappas proposal regarding a land lease ever considered by the Agency. Despite the fact that Larry Barton, attests in his affidavit that negotiations regarding the lease took place, no such discussions ever took place. Moreover, states Pappas, Barton has no personal knowledge of any negotiations so the Court should overlook his attestation. In fact, at oral argument, the Agency conceded that Mr. Barton was in error.

However, Pappas points out that the fact that the Agency sent the solicitation letters to landowners indicates that they were aware that owners do have participation rights. The Agency acted in bad faith by not considering the landowners [sic] proposals. Pappas asserts that the letters are a sham as the agreement with the chosen project is already in place before the letters are even sent out. In the case of the Pappas property, the Agency had had the property appraised by Tim Morse for acquisition for the Fremont Street Experience on August 19, 1992, a full eight months prior to the time the letter soliciting participation was received.

Additionally, the landowners were promised participation in the Redevelopment Plan from the beginning. At the February 19, 1986 hearing, Brent Hawkins, Agency counsel, Mark Wasser's, [sic] partner and predecessor, advised the overflow crowd that:

> "Property acquisition and eminent domain in particular is used very sparingly and under very closely watched procedures. The Redevelopment Plan also contains provisions for owner participation where tenants and property owners in the project area can become active participants in the redevelopment of the

> area. Owner participation can take many different forms. It can be as simple as the Agency making a finding that a particular piece of property is in conformance with the Redevelopment Plan and waiving the power of eminent domain for that particular parcel. ....[sic] Owner participation is one of the principal means that we have for carrying forward redevelopment in the project area and one of the things that the Agency does in connection with the adoption of the Redevelopment Plan is the adoption of Owner Participation Rules." [HT, p. 15-16]

Statements such as this and others made by the public officials present at the hearing induced the citizens, both those present and those who read the media accounts, to forego suing to set aside the plan. Pappas then argues that the equitable doctrine of *estoppel in pais* is applicable in this case to prevent a fraudulent or inequitable resort to the statute of limitations. The doctrine arises when the party against whom a statute is asserted did not exercise their right to sue and was lead not to do so on the basis of the other party's actions. 51 Am. Jur. 2d *Limitations on Actions,* Section 431. Actual fraud is not required, however, the party claiming the estoppel must have relied on the acts in not exercising their right to sue. *Id.* Sections 433, 434.

Furthermore, Pappas reiterates that the Agency was acting as a front for the LLC. Don Snyder, chairman of the LLC, informed landowners that they would not be allowed to participate and at the October 20, 1993 hearing, Bradley Jerbic, City Attorney, informed the Pappas representative who asked about the land lease that:

> "the option was explored early in these negotiations. Some months ago counsel made the decision and the City committed itself to delivering the title to this property to the Fremont Street Experience Limited Liability Corporation for the construction of the parking garage and that does not allow for a lease participation agreement."

Pappas suggests that the Agency had actual knowledge of its requirements to allow owner participation and in violation of the statutes chose to ignore it.

Plaintiffs take the position that it is apparent from the language of NRS 279.566 that there is no "right" of owner participation. The redevelopment plan, Plaintiffs argue, must provide for participation "by the owners of *all or part* of that property..." [emphasis added by the Agency.] Citing two California cases, *In re Bunker Hill Urban Renewal Project 1B*, 37 Cal. Rptr. 74 (1964) and *Sanguinetti v. City Council of Stockton*, 42 Cal. Rptr. 268 (1965), Plaintiffs ask this Court to find as the California courts did that there is no right of landowners to participate in the redevelopment plan. The Agency invites the Court to interpret NRS 279.566 as giving the Agency total discretion to determine how, when and in what manner landowners will be afforded participation opportunities. The Agency concedes that any such discretion would be required to be exercised reasonably.

Plaintiffs also point out that they are not required to send out a thirty day letter. The Agency says that the letters are merely an administrative device developed to assist the Agency in administering owner participation opportunities. The letters are sent in time to allow staff to evaluate them prior to entering

contractual agreement with another developer.

The Agency also relies on its interpretation that a plan and a project are two distinct creatures and that the Legislature in its 1985 amendments was stating that the owners should have a right to participate in the Plan, but not in a specific project. As the Court has already rejected the argument that the Legislature intended a distinction between the plan and the project, and as the Court has also rejected the notion that there is such a distinction, the Court rejects this argument in its entirety. Moreover, the argument is illogical given the Agency's position as to the Plan. If the Plan is only the original March 6, 1986 map (as amended in 1988 and 1992) then the landowners only chance at participation ended in 1986. Why then would the Legislature have included an owner participation provision? In interpreting this provision, the Court must assume that the words have their logical meaning and that the Legislature intended their inclusion to be more than superfluous. Therefore, the Court must conclude that the Legislature meant for landowners to participate in more than just the initial plan.

Defendants urge this Court to enforce two provisions of NRS Chapter 279. The first provision, NRS 279.488, reads as follows:

> Continuation of existing buildings on land; justification for acquisition by agency.
>
> Without the consent of an owner, an agency may not acquire any real property on which an existing building is to be continued on its present site and in its present form and use unless such building requires structural

> alteration, improvement, modernization or rehabilitation, or the site or lot on which the building is situated requires modification in size, shape or use or it is necessary to impose upon such property any of the standards, restrictions and controls of the plan and the owner fails or refuses to agree to participate in the redevelopment plan.

The Court finds that NRS 279.488 is inapplicable to the case at bar as the statute clearly refers to instances when the physical structure is occupied by another party. Here, the Pappas property was razed, thus the statute is not applicable.

The second provision, NRS 279.566, is a different story. It is clearly applicable to the Pappas situation. NRS 279.566 reads as follows:

> Property owner's participation in redevelopment agency's rules; alternative provisions if nonparticipation.
>
> 1. Every redevelopment plan must provide for the participation in the redevelopment of property in the redevelopment area by the owners of all or part of that property if the owners agree to participate in conformity with the redevelopment plan adopted by the legislative body for the areas.
>
> 2. With respect to each redevelopment area, each agency shall, before the adoption of the redevelopment plan, adopt and make available for public inspection rules to implement the

> operation of this section in connection with the plan.
>
> 3. Every redevelopment plan must contain alternative provisions for redevelopment of the property if the owners fail to participate in the redevelopment as agreed.

As required by the Statute, the Las Vegas Redevelopment Plan does provide rules for owner participation. The rules, as is the case for many of the other provisions in the Plan, are reiterations of the statutes that require their adoption. The rules begin in Section 100 by stating that:

> "It is the intention of the Agency to encourage and permit participation in the redevelopment of the Redevelopment area by property owners and tenants to the maximum extent consistent with the objectives of the Redevelopment Plan."

The Rules further provide in Section 400 that:

> "Subject to these rules....Owners and tenants shall be given a reasonable opportunity to participate in redevelopment by:
>
> 1) Retaining all or a portion of their properties;
> 2) Acquiring adjacent or other propertied [sic] within the Redevelopment Area;
> 3) Rehabilitation of existing buildings or improvements;
> 4) New development; or
> 5) Selling their properties to the Agency and

purchasing other properties in the Redevelopment Area.

Each proposal for participation shall be reviewed by the Agency specifically with respect to the following:

1) Conformity with the land use provisions of the Redevelopment Plan;
2) Compatibility with the standards, convenants, restrictions, conditions and controls of the Redevelopment Plan;
3) Compatibility with parcelization of the Redevelopment Area into sites adequate for redevelopment; and
4) The Participant's ability to finance the acquisition and development or improvement in accordance with the Redevelopment Plan.

The Court asked the Agency to provide documentation as to how many landowners had been allowed to participate in the redevelopment process as a result of offering alternative plans. The Agency stated that it does not keep documentation either as to who responds, what the alternative proposal may have been nor if any landowner had been allowed to participate in any project. The Court may therefore assume from the lack of evidence two things: Firstly, that no owners have been allowed to participate in a plan that they did not initiate and secondly, that the Agency is not following its own rules. Even if the Court agreed with the Agency that it has total discretion in deciding how, when and in what manner owner participation will occur, this ten year record of failure in affording even one opportunity for a landowner to participate would most certainly be characterized as a complete abuse of discretion. Again, the

Agency's actions are characterized by a cynicism that believes in following the semantics of the law but not the spirit of the law. The Agency rules and procedures reiterate the statutes but they do *not* fulfill them.

The Pappas proposal was never analyzed in accordance with Rule 400. The Agency produced no documentation that the land lease proposal was ever considered. While it is not for this Court to determine the viability of the land lease option, the Court will note for the record that some of the Hotel-Casinos that form the LLC are situated upon leased land. There has been no showing regarding the absolute need for fee simple. The Court will also note that the Agency's goal is the opposite of the goal in *Hawaii Housing Authority v. Midkiff, supra.* In *Midkiff,* the Housing Authority sought to reduce the oligopoly that controlled Hawaiian land and increase the number of persons owning smaller parcels of land. The Las Vegas Redevelopment Agency seeks to terminate small parcel ownership to consolidate the land into larger parcels and fewer hands.

It is especially appalling that a governmental agency would turn control of the Agency over to a private entity *who is not granted the power of eminent domain pursuant to NRS Chapter 37.* The Legislature has allowed private entities the right of eminent domain, e.g. mining companies NRS 37.010 (6), community antenna television companies, NRS 37.010 (16) or even the beet cane industry, NRS 37.010 (12) yet it has *not* granted the right to private entities in the redevelopment area. While private industry is encouraged to revitalize the community, the Legislature expected, no, required the Agency to maintain some semblance of fairness to the landowners. The LLC is not the only entity to whom the Agency has turned over all control, however, they are the entity involved in this case.

As the Agency currently holds no ownership rights, what rights could the LLC possibly possess?

The Court finds that the landowners have a qualified right to participate in the redevelopment plan pursuant to NRS 279.566. The landowners must be afforded the opportunity, at an early stage, to become part of the plan. This opportunity must be meaningful and the options presented must be explored and analyzed in the same manner as any other proposal brought to the Agency. The landowner does not have an absolute right to participate in each plan in that the Agency must maintain some discretion and flexibility in ascertaining the best proposal for the area. Minimally, the Agency must follow its own rules and analyze each proposal equally. Moreover, the Court specifically finds that it is the Legislative intent that landowners be involved in the plan from the beginning. It is unconscionable that the Agency would commission an appraisal of the property *eight months* prior to the notification of the landowner of the proposed plan, yet wait until shortly before the contract with the "successful" bidder is reached to inform the landowner of the project that will affect their property. This is not in keeping with allowing true participation by the landowners.

Public Use Revisited

After a review of the statutes and the Agency's compliance therewith, the Court finds that the Agency has not complied with the NRS 279.382 through 279.685 sufficiently so as to qualify its taking of the Pappas property as a public use pursuant to NRS 37.010(17). The Agency has also not fulfilled the conditions precedent to endow it with the power of eminent domain. Thus, in accord with the Fifth and Fourteenth Amendments to the United States Constitution; Article I,

Section 8 of the Nevada Constitution, the Nevada Revised States [sic], and the holding in *Schrader v. Third Judicial Dist. Court*, 58 Nev. 188, 73 P.2d 493 (1937), the Agency may not constitutionally take the Pappas property. Neither the Nevada or the U.S. Constitutions provide for private takings, accordingly, this Court does not have jurisdiction to hear this complaint in eminent domain.

Negotiations in Good Faith

Pappas also seeks dismissal of the complaint on the ground that the Agency did not negotiate in good faith prior to attempting to condemn the property. Pappas cites a variety of cases from across the country holding that a good faith attempt to obtain the property must occur prior to condemnation. Such negotiations should not have deadlines nor threats of condemnations.

Plaintiffs state that negotiations are not required by the statutes and that they, in fact, made offers to Pappas prior to the filing of the complaint in eminent domain.

The Court has previously held that NRS 279.424(2) is a condition precedent to the exercise of the power of eminent domain. Therefore, if there must be a showing that the property could not have been obtained in any manner, it logically follows that one must show that one has negotiated in good faith with the landowner prior to the exercise of eminent domain. Since the Plaintiffs did not negotiate with Pappas or show compliance with NRS 279.424(2), the Court finds that the Plaintiffs did not act in good faith as to the Pappas property.

Procedural Due Process

Pappas also reiterates that the possession of their property was made on improper procedure and without due process. The service of Carol Pappas with thirty-five pages of doucments with conflicting dates and with interrogatories and requests for the production of documents which are expressly forbidden under NRCP 26[8] from being served until *after* the case conference in compliance with NRCP 16.1 deprived Pappas of due process and her right to appear at the hearing on the Motion for Immediate Occupancy.

Plaintiffs counter that this issue has been heard multiple times. Additionally, under *Schrader v. Third Judicial Dist. Court*, 58 Nev. 188, 73 P.2d 493 (1937), the service of the summons is all that is required to trigger the ability of the Plaintiff to obtain immediate occupancy. In *Schrader*, the Court let stand the service on the country clerk of the summons as constitutional in a motion for immediate occupancy.

The Court need not reach this issue as the lack of public use has disposed of this case. However, the Court will state that it was offended by the blatant violation of the Rules of Civil Procedure and of the misrepresentations made by the Agency.

---

[8]NRCP 26 (a) Discovery Methods. At any time *after the filing of a joint case conference report*, or upon the entry of an order waiving compliance with Rule 16.1(c), or not sooner than ten (10) days after a party has filed his own case conference report, any party who has complied with Rule 16.1 may obtain additional discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permissions to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

Estoppel and Laches

The Agency believes that it is entitled to relief under the equitable remedies of estoppel and laches based on the fact that the garage is already built and Pappas did nothing to prevent the building. This position is seriously flawed. Firstly, in order to receive equity, one must first do equity. Based upon the Court's prior findings, it is clear that Plaintiffs have unclean hands and are not eligible for equitable relief.

Secondly, the argument is inconsistent with the Plaintiffs' own position. On the one hand, Plaintiffs complain that this Motion is the fourth attempt by Defendants to stop them from obtaining the property and on the other hand, they argue that Pappas did not do enough to stop them from carrying out their occupancy of the Pappas property. Plaintiffs suggest that a restraining order was an option that Pappas ignored while allowing the garage to be built.

Thirdly, this Court has already held that possession pursuant to NRS 37.100 is not a final order and since NRS 37.100(4) calls for a waiver of defenses only as a condition of receipt of the monetary deposit, a defendant retains all defenses to the condemnation. The burden of the risk is on the Plaintiff who utilizes NRS 37.100 as a court may find that the taking does not meet constitutional standards. No rights attach to one who takes subject to the fact that a condemnation may not be entered. In fact, damages to the owner must be paid should title not pass. *Schrader v. Third Judicial Dist. Court*, 58 Nev. 188, 203; 73 P.2d 493 (1937).

In the case at bar, it is the Plaintiff who had control of the situation. The Plaintiff need not have built the garage until all of the final orders of condemnation were entered. The

Plaintiff chose to file for immediate possession, knowing that there was no guarantee of ownership of the property. It is the Plaintiff who bears the risk of building on another's property. This is especially true where the Plaintiff so vigorously pursued the early taking. Interestingly, NRS 37.100(6) allows the *Plaintiff*, and not the defendants to obtain a restraining order:

> "The court or judge may also restrain the defendant from hindering or interfering with the occupation of the premises and the doing thereon of the work required for the easement, fee, or property rights."

The Court finds no merit to this argument.

CONCLUSION

The Court is well aware of the turmoil that has surrounded the decisions of the Redevelopment Agency in the past year. It is for this reason that the Court chose to make the record as complete as possible. The Court believes that, ultimately, the decision on this issue will rest with the Nevada Supreme Court.

The record reveals an Agency that is, at best, insensitive and at worst, insincere in the way that it has attempted to fulfill its mission. The history of the Agency is a trail of mistakes, missteps and misstatements.

From the initial amendments in 1985 and the statements to the Legislature that there was no contemplated redevelopment area in the City, to the mistakes made by staff in failing to complete the block survey and the mistakes in the notice of hearing as to the adoption of the Plan, to the

representations made to the citizens of Las Vegas at the hearing on February 19, 1986 as to the use of eminent domain and owner participation, to the misstatements made to the Legislature in 1993 regarding the treatment of the property owner about to be displaced by the Fremont Street Experience, to the missteps in the service of Mrs. Pappas, to the misstatement regarding the lack of opposition to the Motion for Immediate Occupancy, and finally to the inconsistency in positions taken in this Court with the record of previous acts and statements by the Agency, the Agency has shown that it has consistently failed to comply with the procedural safeguards laid out by the Legislature for the protection of the rights of people who own property.

The Agency has set itself up as an entity answerable only unto itself. The Agency truly believes that compliance with the statutes is a matter of lip service and not of customer service. The Agency has convinced itself that it can operate in its own world making deals without answering to the courts, the legislature or the public.

They are wrong in that regard. The Court today finds that the failure of the Agency to comply with the spirit and the letter of the law render the Agency's actions void and unenforceable. The Agency has acted contrary to law and in an arbitrary and capricious manner as to the adoption of its initial plan in 1986, in its failure to amend the plan for the various projects that it engages in to meet the specificity requirements, in its failure to hold the requisite public hearings, in its failure to allow owner participation in its projects, in its failure to show the inability of its private partners to purchase property without the use of eminent domain and in its failure to negotiate in good faith with current landowners. This inability to operate within the spirit of the law forces this Court to

dismiss this action as the Court lacks jurisdiction to hear the complaint in eminent domain where the Agency does not have the power of eminent domain.

The mission of the Redevelopment Agency is a valuable one. No one involved with this issue can favor the retention of blighted areas. Everyone favors improving the health and safety of our community. However, Nevadans do not believe in trampling on one party's right to help another party, no matter how worthy the cause. This is the reason for the safeguards that the Legislature has built into the Redevelopment Act. Until the Agency complies with the provisions of the Act, none of its actions will qualify as a constitutional taking for public use. Arranging inexpensive transfers of property between unwilling citizens and large businesses is a private taking and thus prohibited by the Constitution. This Court cannot and will not sanction the disregard of the constitutionally guaranteed rights of the citizens of Nevada.

ORDER

IT IS HEREBY ORDERED that Defendant's Motion for Dismissal of the Complaint in Eminent Domain is GRANTED. The Lis Pendens is to be expunged from the subject property.

DATED this 3rd day of July, 1996.

/s/ Don P. Chairez
DON P. CHAIREZ
DISTRICT COURT JUDGE

(3)

No. 03-972

Supreme Court, U.S.
FILED
FEB 5 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CAROL PAPPAS, JOHN H. PAPPAS, JR., and HARRY J. PAPPAS,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, and FREMONT STREET EXPERIENCE PARKING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF IN OPPOSITION

DANIEL F. POLSENBERG
Counsel of Record
HEIDI PARRY STERN
BECKLEY SINGLETON, CHTD.
530 Las Vegas Blvd. South
Las Vegas, Nevada 89101
(702) 385-3373

WILLIAM P. HENRY
PHILLIP A. BYRNES
LAS VEGAS CITY ATTORNEY
OFFICE – CIVIL
400 E. Stewart Avenue
Las Vegas, Nevada 89101

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should this Court grant certiorari to review a determination by the Nevada Supreme Court, applying the test announced by this Court in *Berman v. Parker*, 348 U.S. 26 (1954), holding that it was an appropriate public use under the Fifth and Fourteenth Amendments for a redevelopment agency to take private property pursuant to state statutes allowing eminent domain to eliminate blight and consistent with a redevelopment plan adopted, under those statutes, for that area of downtown found by the city council to be a blighted area?

STATEMENT

Respondent City of Las Vegas Downtown Redevelopment Agency is a governmental agency and has no shareholders.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT	ii
STATEMENT OF THE CASE	1
Introduction	1
Petitioners' Misstatements of Fact	2
REASONS FOR DENYING THE PETITION	7
I. Petitioners Delayed Years Before Raising The Constitutional Issue Of Public Use In The State Courts And Have Improperly Raised Another New Issue In Their Petition To This Court	7
II. The Nevada Supreme Court Correctly Interpreted And Applied *Berman* And *Midkiff*	8
A. The Legislature Has The Primary Responsibility For Determining Whether Redevelopment Serves A Public Purpose	8
B. Urban Blight Was Prevalent In The Downtown Las Vegas Area Where The Pappases' Property Was Located	10
C. The Existence Of Urban Blight Provided A Legitimate Basis For Implementation Of The Redevelopment Plan	11
III. There Is No Conflict Among The State Courts In Interpreting *Berman* And *Midkiff*	12
A. State Courts Faced With Factual Situations Similar To Those Present Here Have Uniformly Upheld Takings For The Purpose Of Eliminating Blight	13

TABLE OF CONTENTS – Continued

Page

B. The Cases Cited By Petitioners Are Factually Dissimilar To This Case And Present The Uncommon Situation Of A Local Government Overextending Its Power Under The Takings Clause..... 14

IV. There Is No Need To Reconsider *Berman* And *Midkiff* In Light Of *Dolan* 16

V. Community Redevelopment, As Opposed To Mere Economic Development, Is An Important Part Of The Police Power Granted To The Legislative Branch And Should Be Granted Deference By The Courts..... 17

CONCLUSION..... 19

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 7

Berman v. Parker, 348 U.S. 26 (1954) ..... *passim*

Charleston Urban Renewal Auth. v. Courtland Co., 509 S.E.2d 569 (W. Va. 1998) 12, 14

City of Birmingham v. Tutwiler Drug Co., 475 So. 2d 458 (Ala. 1985) 12, 13

City of Las Vegas Downtown Redev. Agency v. Crockett, 34 P.3d 553 (Nev. 2001) 6, 9

City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003) 5

City of Phoenix v. Superior Court, 671 P.2d 387 (Ariz. 1983) 12

Dolan v. City of Tigard, 512 U.S. 374 (1994) 16, 17

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) ..... *passim*

Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) 17

Mayor v. Thomas, 645 So. 2d 940 (Miss. 1994) 15

Old Dominion Co. v. United States, 269 U.S. 55 (1925) 9

Redevelopment Agency of the City of Chula Vista v. Rados Bros., 115 Cal. Rptr. 2d 234 (Cal. Ct. App. 2001) 12

Rosenthal & Rosenthal, Inc. v. New York State Urban Dev., 771 F.2d 44 (2d Cir. 1985) 12

Sears v. City of Akron, 246 U.S. 242 (1918) 11

TABLE OF AUTHORITIES – Continued

Page

Southwestern Illinois Dev. Auth. v. National City Envtl., LLC, 768 N.E.2d 1 (Ill. 2002) 15

State ex rel. United States Steel v. Koehr, 811 S.W.2d 385 (Mo. 1991) 12, 14

Yee v. City of Escondido, 503 U.S. 519 (1992) 17

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 1, 8, 11

U.S. Const. Amend. XIV 1, 8, 11

STATUTES

Nev. Rev. Stat. Chapter 279 ..... 4, 6, 7, 9, 10

OTHER AUTHORITIES

George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991 (2001) 18

STATEMENT OF THE CASE

Introduction

This case does not present the issue asserted by Petitioners, namely, whether condemnation can be justified to promote economic development, without more. Instead, this case involves implementation of an intricate statutory system designed by the Nevada legislature to arrest and eradicate blight in Nevada's ailing urban areas. While Petitioners express concern that some local agency somewhere might overstep the bounds of its takings power under the Fifth and Fourteenth Amendments, that is not what occurred here.

Certiorari is not appropriate in this case, where there is no question of federal law that has not already been determined by this Court, the decision of the Nevada Supreme Court does not conflict with decisions from the high courts of other states, and where the issues presented are raised for the first time in the petition before this Court. Simply stated, the Nevada Supreme Court resolved a not-uncommon question, deciding that a taking executed as part of a local redevelopment program is constitutional. It did so, like numerous state courts before it, according to the standard announced by this Court in *Berman v. Parker*, 348 U.S. 26 (1954), and reiterated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

The governing legal standard, established by this Court in *Berman* and *Midkiff*, is that a taking is permissible under the Public Use Clause of the Fifth and Fourteenth Amendments "where the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241 (citing *Berman*, 348 U.S. 26). While this standard is rightly deferential to

legislative determinations of public purpose, it does not result in the abdication of the judicial branch's responsibility to examine the constitutionality of takings under the Public Use Clause. Neither the City of Las Vegas Downtown Redevelopment Agency (the "Agency"), nor the Nevada Supreme Court, has taken the position that courts have no role in protecting the constitutional rights of private landowners. Indeed, the cases cited by Petitioners illustrate that the *Berman* standard does indeed allow for review and a finding of unconstitutionality under appropriately egregious facts. The Agency's narrow position here is that the facts of this case in no way warrant a finding of unconstitutionality, as the Nevada Supreme Court has concluded.

Petitioners' Misstatements Of Fact

The Pappases' petition contains many misleading statements regarding the case, the procedural events and the condition of the downtown area slated for redevelopment. This opposition can address only the more glaring instances.

1. Petitioners assert that the Las Vegas City Council (the "Council") made no findings of blight in designating downtown Las Vegas as a redevelopment area. (Petition at 3, 5). Nothing could be further from the truth.[1]

[1] Downtown Las Vegas should not be confused with the glamorous Las Vegas "Strip," which is actually located outside the city limits. Although Las Vegas Boulevard runs adjacent to this downtown property, the section of that street containing the resort area commonly considered the "Strip" is several miles to the south.

In fact, the Council based its approval of the Agency's March 1986 Redevelopment Plan (the "Plan") on the following evidence of blight in the downtown Las Vegas area:

- Prevalence of vacant and abandoned office buildings, homes, apartment buildings, motels and even a vacant high-rise hotel used as a "flop house" by transients (Respondent's Appendix ("R. App.") 3, 14);
- Varying degrees of structural deterioration on approximately 24% of the blocks surveyed, including buildings with advanced dilapidation, burned-out shells and boarded-up vacancies (R. App. 3);
- Dwellings with inadequate living space, and structures of all types with substandard and insufficient plumbing and wiring, and antiquated central heating systems (R. App. 4-8);
- Multiple building types on small parcels causing noise, odor, fire hazards and aesthetic problems (R. App. 5-6);
- Defective design and poor character of construction (R. App. 6);
- Business stagnation and failure, including the flight of several anchor businesses during the ten-year period prior to the Plan, including Nevada Power, J.C. Penney, Nevada Savings, Garrett's Furniture, and others (R. App. 12-13); and
- Small and irregular lots not suitable for modern business uses (R. App. 10-12, 18).

* "[O]n a *per capita* basis, the Redevelopment Area generates 175% more police responses than the overall [Metropolitan Police] services area." (R. App. 1).

These conditions are not only solid evidence of blight, they are just the type of conditions contemplated by the Nevada legislature in enacting the Community Redevelopment Law, Nev. Rev. Stat. Chapter 279, which defines blight and provides a road map for its elimination.[2]

---

[2] Nev. Rev. Stat. 279.388 provides as follows:

"Blighted area" means an area which is characterized by one or more of the following factors:

1. The existence of buildings and structures, used or intended to be used for residential, commercial, industrial or other purposes, or any combination thereof, which are unfit or unsafe for those purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime because of one or more of the following factors:

   (a) Defective design and character of physical construction.

   (b) Faulty arrangement of the interior and spacing of buildings.

   (c) Overcrowding.

   (d) Inadequate provision for ventilation, light, sanitation, open spaces and recreational facilities.

   (e) Age, obsolescence, deterioration, dilapidation, mixed character or shifting of uses.

2. An economic dislocation, deterioration or disuse, resulting from faulty planning.

3. The subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.

4. The laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions.

5. The existence of inadequate streets, open spaces and utilities.

(Continued on following page)

2. Petitioners' assertion that the Agency condemned the Pappases' land solely to benefit a group of downtown casino owners is similarly misplaced. The Council, acting on the Las Vegas community's need for redevelopment of the deteriorating downtown area, created the Agency on November 6, 1985. *See City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 6 (Nev. 2003) (Petitioners' Appendix "Pet. App." 3a). Shortly thereafter, the Council designated an area in downtown Las Vegas to evaluate for blight and the potential for redevelopment. (Pet. App. 3a). Based on surveys of the area by the Agency's staff and the city's planning commission, the Council adopted the Redevelopment Plan for an area of downtown Las Vegas that included the Pappases' small, 7,000 sq. ft. parcel on the corner of Carson Street and Las Vegas Boulevard. (*Id.*). Prior to adoption of the Plan on March 5, 1986, the

---

6. The existence of lots or other areas which may be submerged.

7. Prevalence of depreciated values, impaired investments and social and economic maladjustment to such an extent that the capacity to pay taxes is reduced and tax receipts are inadequate for the cost of public services rendered.

8. A growing or total lack of proper utilization of some parts of the area, resulting in a stagnant and unproductive condition of land which is potentially useful and valuable for contributing to the public health, safety and welfare.

9. A loss of population and a reduction of proper use of some parts of the area, resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere.

This provision was enacted in 1959 and has been amended only once since then.

Council conducted a public hearing to allow the public to address the findings of blight and plans for redevelopment. (Pet. App. 5a). Despite receiving notice, the Pappases did not attend the hearing or object to the plan at that time, nor did they take judicial action to contest the plan as provided for and required by Nev. Rev. Stat. 279.609.[3] (Pet. App. 5a-6a). Without such a challenge, the Council's adoption of the Plan created a conclusive presumption that the redevelopment area was blighted pursuant to Nev. Rev. Stat. 279.589.[4]

In the early 1990's, the Agency and a group of downtown businesses began earnestly planning a large-scale redevelopment project for downtown Las Vegas intended to revitalize Las Vegas's downtown core. (Pet. App. 6a-7a). A major part of this project was the construction of the Fremont Street Experience, a pedestrian mall and entertainment venue intended to attract local residents and visitors alike to downtown Las Vegas, thereby revitalizing the economy and eliminating the blighted conditions present in the neighborhood. (*Id.*). The project called for the closing of a section of Fremont Street to auto traffic, the creation of a pedestrian plaza, and the erection of a

---

[3] *See* Nev. Rev. Stat. 279.609 (stating that any action questioning the validity of a redevelopment plan or challenging any finding of blight must be brought within 90 days of adoption of the plan). *See also City of Las Vegas Downtown Redev. Agency v. Crockett*, 34 P.3d 553 (Nev. 2001).

[4] Nev. Rev. Stat. 279.589 provides in part:

> The decision of the legislative body concerning a redevelopment area is final and conclusive, and it is thereafter conclusively presumed that the redevelopment area is a blighted area and that all prior proceedings have been properly and regularly taken.

steel mesh canopy stretching several city blocks onto which light shows and special effects are presented to entertain visitors. (Pet. App. 7a). Implementation of the project necessitated building a parking garage on the block where the Pappases' property was located. (*Id.*).

The Agency instituted eminent domain proceedings against the Pappases on November 19, 1993 and was granted immediate occupancy. (Pet. App. 8a). Despite numerous trial continuances requested by the Pappases over the ensuing years, the Pappases did not raise the legitimacy of the Agency's taking until they moved to dismiss the complaint approximately three years after the district court authorized the Agency to redevelop the property. (Pet. App. 9a-10a). By that time, the parking garage had already been constructed.

REASONS FOR DENYING THE PETITION

I. Petitioners Delayed Years Before Raising The Constitutional Issue Of Public Use In The State Courts And Have Improperly Raised Another New Issue In Their Petition To This Court

This Court has, with only rare exceptions, refused to "consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" being reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Consistent with a pattern of delay and opportunism exhibited throughout this litigation, the Pappases raise for the first time in their petition to this Court the claim that *Berman* and *Midkiff* should be reconsidered and that a heightened level of scrutiny

should be applied to takings under the Fifth and Fourteenth Amendments.

The Pappases exhibited this same disregard for procedure in the state courts, where they waited literally years to raise any constitutional takings claim at all. The Pappases' answer to the Agency's complaint raised no objection to the taking of their property under the power of eminent domain, nor did the Pappases ever raise the issue of an unconstitutional taking during the years that this case was before the Nevada district court. Instead, the Pappases asked for numerous trial continuances, delaying trial until they were able to formulate a claim on which to base a motion to dismiss. Then, before the Nevada Supreme Court, the Pappases essentially ignored the *Berman* rational relationship test, instead urging the court to "strictly construe[ ]" the Nevada redevelopment statute "in favor of the landowner against the condemning party." (R. App. 16). Now they have invented yet another novel theory. This Court should refuse to grant the Pappases' petition on the basis of their newly manufactured claim that a heightened level of scrutiny applies to the taking of their property.

II. The Nevada Supreme Court Correctly Interpreted And Applied *Berman* And *Midkiff*

A. The Legislature Has The Primary Responsibility For Determining Whether Redevelopment Serves A Public Purpose

This Court, in *Berman*, set forth a standard of review for takings in the redevelopment context that requires reviewing courts to grant deference to local legislative bodies. Specifically, courts are to view a legislative decision

that redevelopment serves the public as "well-nigh conclusive." *Berman*, 248 U.S. at 32. This standard was reiterated in *Midkiff*. *See Midkiff*, 467 U.S. at 240 ("[D]eference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.'") (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

The Nevada Supreme Court demonstrated that same judicial deference in considering legislative determinations. The Nevada legislature has identified the elimination of blight as a public purpose in that state's Community Redevelopment Law. *See* Nev. Rev. Stat. 279.418 and 279.420. The legislative definition of blight includes a broad range of considerations, including "[t]he subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness . . . , [p]revalence of depreciated values, impaired investments and social and economic maladjustment . . . , [and a] loss of population and a reduction of proper use of some parts of the area. . . . " Nev. Rev. Stat. 279.388. The Nevada Supreme Court relied on these factors in reversing the dismissal of the Agency's eminent domain action. (Pet. App. 16a-17a).[5]

The Nevada Supreme Court also properly deferred to the specific findings of blight by the Council and the Agency in their legislative function. (Pet. App. 16a-17a). Specifically, the court concluded that "the Agency's purpose for entering into a redevelopment agreement with Fremont Street Experience was to construct a safe

[5] The Nevada Supreme Court had previously found the same 1986 redevelopment plan to be valid under and consistent with the Nevada statutes in *City of Las Vegas Downtown Redev. Agency v. Crockett*, 34 P.3d 553 (Nev. 2001).

entertainment street mall to attract visitors and businesses back to the downtown area." (Pet. App. 17a). "Thus, the project's central focus was to combat economic, social, and physical blight, a public purpose as defined by the Legislature." (*Id.*).

B. Urban Blight Was Prevalent In The Downtown Las Vegas Area Where The Pappases' Property Was Located

The Nevada Supreme Court recognized that the report, produced by the Agency and the city's planning commission, identified evidence of blight in the downtown redevelopment area. (Pet. App. 3a-5a). The report showed severe decay and deterioration throughout the downtown area, including "increased crime rates and requests for police assistance, business flight from the downtown area, decline in tourism, lack of parking, visitor and residents' perceptions of lack of safety in the area, and increases in vacant and aging buildings." (*Id.*). This evidence led the city council and the Agency to adopt the redevelopment plan.

In their petition, the Pappases choose to disregard these findings, asserting instead that this case does not involve the redevelopment of a blighted area. The facts, however, speak for themselves. Before exercising any powers of eminent domain or even adopting a specific redevelopment plan for the area, the Council and the Agency found that "blight was causing a serious physical, social, and economic burden on the City in all applicable downtown areas." (Pet. App. 5a). While the Agency tried various methods of remedying the blight in the years following issuance of the report, no one project was comprehensive enough to solve the problems of the economically and socially depressed downtown area. (Pet. App.

5a-6a). It was under these conditions that the Fremont Street Experience was adopted as the "anchor" project for downtown Las Vegas's redevelopment. (Pet. App. 7a).

Intertwined with the Pappases' misstatements as to blight in the redevelopment area as a whole is their assertion that no blight was reported as to their particular parcel of land. This Court has already established that whether or not blight exists on a particular parcel of land within an otherwise blighted redevelopment area is irrelevant to the question of whether a taking of that parcel is constitutional. *See Berman*, 348 U.S. at 75 ("Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending."). Petitioners' assertions regarding their particular parcel of land are therefore properly disregarded.

C. The Existence Of Urban Blight Provided A Legitimate Basis For Implementation of The Redevelopment Plan

The Nevada Supreme Court correctly accorded deference to the Agency's determination that elimination of blight was a public purpose necessitating a taking pursuant to the Fifth and Fourteenth Amendments. The court's determination was consistent with *Berman*'s instruction that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." *Berman*, 348 U.S. at 32; *see also Sears v. City of Akron*, 246 U.S. 242, 251 (1918) ("[W]hile the question whether the purpose of a taking is a public one is judicial, the necessity and the proper extent of a taking is a legislative question.") (citation omitted).

Petitioners, in essence, fault the Nevada Supreme Court for declining to go beyond its established role and second guess the decisions of the Nevada legislature. The Nevada Supreme Court's decision, however, was consistent with *Berman* and with sound public policy. As the voice of the public, the legislature is uniquely suited to make determinations as to the best interests of the community it serves.

III. There Is No Conflict Among The State Courts In Interpreting *Berman* And *Midkiff*

The cases cited by Petitioners do not evidence a split among the high courts of the states as to the proper interpretation of *Berman* and *Midkiff*. Instead, these cases merely illustrate disparate circumstances properly leading to different conclusions under the *Berman* test. While there have been times when local governments acted in excess of their legislative authority – and these instances have not been overlooked by the courts – many more cases involve appropriate implementation of a redevelopment plan reasonably related to the elimination of blight. *See, e.g., Rosenthal & Rosenthal, Inc. v. New York State Urban Dev.*, 771 F.2d 44 (2d Cir. 1985); *Charleston Urban Renewal Auth. v. Courtland Co.*, 509 S.E.2d 569 (W. Va. 1998); *State ex rel. United States Steel v. Koehr*, 811 S.W.2d 385 (Mo. 1991) (en banc); *City of Birmingham v. Tutwiler Drug Co.*, 475 So. 2d 458 (Ala. 1985); *City of Phoenix v. Superior Court*, 671 P.2d 387 (Ariz. 1983) (in banc); *Redev. Agency of the City of Chula Vista v. Rados Bros.*, 115 Cal. Rptr. 2d 234 (Cal. Ct. App. 2001). The fact that the same test results in different conclusions depending on the facts of each case does not indicate that courts are split on the

fundamental issues of what test to apply and how to apply it.

A. State Courts Faced With Factual Situations Similar To Those Present Here Have Uniformly Upheld Takings For The Purpose Of Eliminating Blight

When confronting legislatively created redevelopment or renewal plans to remedy blighted areas, state courts consistently follow the dictates of *Berman* and *Midkiff* in much the same way as did the Nevada Supreme Court. For example, in *City of Birmingham v. Tutwiler Drug Co.*, 475 So. 2d 458 (Ala. 1985), the City of Birmingham determined its downtown area was in need of redevelopment. 475 So. 2d at 460. The city adopted a Community Renewal Plan and, under it, utilized eminent domain to take plaintiff's land. *Id.* Citing *Berman*'s mandate that "[t]he role of the judiciary in determining whether the legislature is exercising its power for a public purpose is an extremely narrow one," *id.* at 468, the Alabama Supreme Court found that the city had not unconstitutionally exceeded its authority to enact and implement a redevelopment statute intended to eliminate blight. *Id.* at 468.[6]

Faced with similar facts, the Supreme Court of Appeals of West Virginia reached the same conclusion regarding redevelopment of an urban, downtown area. *See*

---

[6] In *Tutwiler Drug*, the area that was the subject of redevelopment "was not a slum." *Id.* at 467. Nevertheless, it had many of the indicia of economic stagnation such as "obsolescence, faulty arrangement or design, excessive land coverage, deleterious land use, and obsolete layout." *Id.*

Charleston Urban Renewal Auth. v. Courtland Co., 509 S.E.2d 569, 570 (W. Va. 1998). Citing *Berman*, that court found that it is not necessary for the particular parcel of land at issue to be blighted as long as the area addressed by the renewal plan is a blighted area. *Id.* at 574. Similarly, the court held that the city authority adequately stated a "constitutionally legitimate public use," *id.* at 578, such that eminent domain was permissible.

In yet another redevelopment case, the Supreme Court of Missouri upheld a city's taking and found, based on *Berman*, that "the owner of each tract of land in a blighted area cannot be permitted to resist development programs on the ground that his property is not being taken for a public use." *State ex rel. United States Steel v. Koehr*, 811 S.W.2d 385, 389 (Mo. 1991) (en banc). This would defeat the purpose of redevelopment legislation. *Id.*

These cases demonstrate a consistent judicial recognition that urban renewal and redevelopment projects are public purposes under the state's police powers to promote health, safety and welfare. As such, they also embody the appropriate respect for legislative determinations of the public interest in the revitalization and utilization of ailing urban centers.

B. The Cases Cited By Petitioners Are Factually Dissimilar To This Case And Present The Uncommon Situation Of A Local Government Overextending Its Power Under The Takings Clause

The cases cited by Petitioners, while analyzed under the *Berman* and *Midkiff* standard, do not involve the same underlying facts as the present case. In particular, they do

not involve efforts to eliminate blight, nor do they involve any findings of blight.

Certainly, the absence of a finding of blight or any redevelopment plan triggered the Illinois Supreme Court's conclusion in *Southwestern Illinois Development Authority v. National City Environmental, LLC,* 768 N.E.2d 1, 9-10 (Ill. 2002). While the court recognized that, "[c]learly, the taking of slums and blighted areas is permitted for the purposes of clearance and redevelopment, regardless of the subsequent use of the property," the taking in *Southwestern* was not part of any "independent, legitimate governmental decision to further a planned public use." *Id.* at 10. There was no "plan" dictating a need for the taking, nor was any study of the area commissioned regarding the parking situation in the area. *Id.* Instead, the local government essentially offered its taking power for sale to private developers "for a fee," offering to "condemn whatever land 'may be desired. . . . '" *Id.* (internal quotation marks omitted). This conduct is patently impermissible under *Berman,* but it is vastly different from the case at bar.

Likewise, in *Mayor v. Thomas,* 645 So. 2d 940 (Miss. 1994), not only was there no mention of blight or any other justification for the taking, the city also failed to establish any requirement that the property taken would be used for a public purpose. *Id.* at 943. "Because the use of [the] land will be at the whim of Harrah's [the developer to which the land was conveyed], the private use . . . by Harrah's will be paramount, not incidental, to the public use and any public benefit from the taking will be speculative at best." *Id.*

Southwestern and *Mayor* are cases in which the local governmental authority failed to prescribe or follow

legislative requirements to ensure a legitimate public purpose to justify condemnation. In this case, the Agency does not share those failings. There were findings of blight in the area. The city established a plan for the area and established particular uses for the land. The construction of the parking garage and commercial venues for tourism fell within the plan for this block. The Nevada Supreme Court reviewed the case to ensure that the Plan was proper and that the particular project was consistent with the Plan. This is the constitutional analysis envisioned by *Berman* and utilized by the high courts in other states. In short, this case is one of many involving urban redevelopment in which applying the same constitutional test yields the same result: this was a constitutionally valid taking.

IV. There Is No Need To Reconsider *Berman* And *Midkiff* In Light Of *Dolan*

Petitioners greatly overstate the Nevada Supreme Court's holding in this case and its consequences for private property ownership rights. Contrary to Petitioners' implication, the rights of private property owners are not in peril as a result of *Berman*, *Midkiff,* or the appellate decision below. If anything, the Nevada court's decision further legitimizes the appropriate standard for review of governmental takings outlined in *Berman* and *Midkiff*. Constitutional protections remain in place to protect the rights of private property owners. As the Petitioners' own cited cases demonstrate, these protections are far from vitiated.

Petitioners rely on *Dolan v. City of Tigard*, 512 U.S. 374 (1994), but that decision cannot be used as a springboard for sweeping changes to the *Berman* reasonable

relationship test. As an initial matter, *Dolan* involved a regulatory taking, not a taking of title to property. *See Dolan*, 512 U.S. 377. In the regulatory context this court is required to conduct a "complex factual assessment of the purposes and economic effects of government actions," while it is required only to "apply a clear rule" in the case of a taking of title. *Yee v. City of Escondido,* 503 U.S. 519, 523 (1992); *see also Lebron v. Nat'l Railroad Passenger Corp.,* 513 U.S. 374, 381 (1995) ("[W]hat would go to show a regulatory taking and what would go to show a physical taking [are] quite different."). This more invasive review does not apply to this case.

Far from putting into question the standard of review set forth in *Berman* and *Midkiff,* moreover, *Dolan* actually reaffirms it. Citing with approval the "reasonable relationship" test adopted by the state courts, this court in *Dolan* adopted a "rough proportionality" test for reviewing regulatory takings under the Fifth and Fourteenth Amendments. *See Dolan*, 512 U.S. at 391. Under this test "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* In practice, this standard is no stricter than the reasonable relationship test set forth in *Berman.*

V. Community Redevelopment, As Opposed To Mere Economic Development, Is An Important Part Of The Police Power Granted To The Legislative Branch And Should Be Granted Deference By The Courts

The Agency's position is not intended to denigrate the importance of private property rights, both historically and in our modern day. While the right to own private

property is fundamental, the power of the government to rededicate land to public use through eminent domain is also embodied in the plain language of the Constitution. The corresponding power, upheld by this Court, to redevelop blighted urban areas is vital to the health and safety of citizens living in and visiting these areas.

Comprehensive redevelopment is sometimes necessary to correct a myriad of social and economic ills that plague dilapidated downtown areas, problems such as crime, inefficient use of land and parking that inhibit beneficial commercial and cultural activity in the area. Without the power to implement redevelopment statutes in urban areas, "cities and counties must remain largely passive players in shaping the use of land within their boundaries, even when the private sector isn't filling community planning aspirations." George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law,* 52 HASTINGS L.J. 991, 1038 (2001).

This Court has already struck the appropriate balance between the roles of the courts and the legislature, and this approach is consistently followed in the lower appellate courts. There is no basis, on the facts of this case, for this Court to consider the Pappases' petition.

CONCLUSION

For the reasons stated above, the Agency respectfully requests that this Court deny the Pappases' petition for writ of certiorari.

Respectfully submitted,

DANIEL F. POLSENBERG
Counsel of Record
HEIDI PARRY STERN
BECKLEY SINGLETON, CHTD.
530 Las Vegas Blvd. South
Las Vegas, Nevada 89101
(702) 385-3373

WILLIAM P. HENRY
PHILLIP A. BYRNES
Las Vegas City Attorney
Office – Civil
400 E. Stewart Avenue
Las Vegas, Nevada 89101

Counsel for Respondents

EXHIBIT 3

REDEVELOPMENT AREA

CRIME ANALYSIS

In evaluating data provided by the Crime Analysis Unit of the Las Vegas Metropolitan Police Department, it has been determined that there is a higher percentage of calls for service, based on population, in the Redevelopment Area when compared to the total area served by Metro.

During 1985 Metro responded to 146,206 calls for service of which 24,583 calls were in the Redevelopment Area. This constitutes 16.8% of total calls received. However, the Redevelopment Area population of approximately 22,317 is only 6.1% of the urbanized population (365,772) served by Metro. On a per capita basis, this represents 1.10 calls for service in the Redevelopment Area as compared to 0.40 calls per person throughout the urbanized service area. Thus, on a per capita basis, the Redevelopment Area generates 175% more police responses than the overall Metro service area.

WJ:cl
99:RACA1
2-18-86

EXHIBIT 7

REPORT TO THE CITY COUNCIL
ON THE
REDEVELOPMENT PLAN
FOR THE
DOWNTOWN LAS VEGAS
REDEVELOPMENT AREA

JANUARY, 1986
Prepared by
City of Las Vegas
Downtown Redevelopment Agency

* * *

The principal objective of the following subsections is to describe the extent of blighted conditions and blighting influences within the Redevelopment Area, as they pertain to the specific physical, social, and economic determinants of "blight" described in the foregoing excerpts from the Community Redevelopment Law.

B. *EXISTING PHYSICAL CONDITIONS*

* * *

2. *Land Uses and Acreage*

* * *

Although land use patterns in some areas are internally consistent, in most instances within the Redevelopment Area, the mixed land uses tend not to be complementary leading to appearances of congestion and faulty planning.

* * *

3. *Buildings and Structures*

The Redevelopment Area contains a wide variety of buildings and structures used or intended to be used as living and/or work spaces, some of which are unfit or unsafe for such uses because of the factors discussed below.

a. *Deterioration and Dilapidation*

A visual survey of the Redevelopment Area resulted in observations of deteriorated and delapidated structures throughout. On a block-by-block basis, it was determined that approximately 24% of the blocks contained structures where varying degrees of deterioration were evident. These ranged from structures with minor dilapidation which could be corrected with minor rehabilitation such as painting and general repairs to structures that indicated advanced dilapidation, including burnt-out shells and boarded up vacancies. (See pictorial display.)

Poor property maintenance also contributes to the state of deterioration in the Area. Observations of "junk" accumulation and inadequate or non-existent storage facilities were major contributors to the overall look of disrepair. Finally, given the age of most structures in the Area (delineated further in the following section), the natural progression of structural "wear and tear" is evident in those instances where adequate maintenance was not instituted.

b. *Age and Obsolescence*

Although records pertaining to the date of construction of most structures in the Area are not readily available, based on data provided in the 1980 Census, it is estimated that approximately 78.8% of all structures were constructed prior to 1969. This indicates that most structures are at least 17 years old. In addition, approximately 26.3% of all structures were constructed in 1949 or earlier, and are at least 37 years old.

One of the consequences that frequently accompanies structural aging is obsolescence. As a building ages, its utility may diminish as newer, more efficiently designed structures are built in other locations, or its utility may cease altogether if the original use terminates or moves elsewhere. For example, the small neighborhood-scale grocery, drug, clothing, etc. stores that are typical within the Redevelopment Area lack sufficient available space to display the ever increasing range of products normally found in more modern, larger scale stores, and generally lack adequate storage, loading, and parking facilities needed for an efficient merchandising operation. Costs associated with upgrading these older structures to serve modern day commercial tenants are high, and private sector developers have found it more cost effective to construct newer facilities in other areas of Las Vegas where land and space is more readily available and development is not subject to the constraints of multiple ownership of small parcels, and where a larger percentage of prospective clientele resides.

The age of residential structure tends to be somewhat consistent with the age of other structures within the Redevelopment Area. Factors contributing to their obsolescence may include inadequate living space, sub-standard plumbing and wiring to accommodate modern appliances, antiquated central heating systems, and/or a lack of covered off-street parking.

c. *Mixed Character of Buildings*

Buildings are generally characterized by the uses for which they were originally designed, i.e., commercial buildings have a commercial character, residential buildings have a residential character, etc. When two or more buildings containing different uses exist on the same parcel or on abutting parcels, such buildings are considered to be of mixed character. While different uses in adjacent structures can be compatible, they can also create incompatible (aesthetic, noise, odor, fire safety, etc.) conditions, particularly when residential uses occur adjacent to commercial and/or employment uses.

Evidences of incompatible mixtures of uses are prevalent throughout the Redevelopment Area, where many older residential structures remain adjacent to commercial service alleys, loading areas, outdoor storage yards and/or parking areas, or "in the shadows" of multi-storied commercial structures. Additionally, as the availability of vacant lots within the Redevelopment Area is limited and the amount of private sector commercial development is hindered, many of the previously designated land uses are

"changed" to accommodate such development. Thus, throughout the Redevelopment Area, it can easily be seen that many lots are occupied by multiple building types.

d. *Defective Design and Character of Physical Construction*

Virtually all of the structures in the Redevelopment Area built prior to the 1960's have design defects which do not conform to current Building and/or Fire Codes. Although all major hotel/casinos and multistoried buildings have been retrofitted with sprinkler systems, a substantial portion of all other older structures do not have this feature. In addition, most of the older structures suffer defects relating to inadequate or deteriorated plumbing, heating, and/or electrical systems. While these systems were generally consistent with codes at the time of construction, recent changes in code requirements have made these buildings nonconforming to a certain extent.

Another design defect evident in the Area is the existence of buildings constructed in total disregard to architectural character or scale of surrounding structures. This is apparent in those instances where multistoried buildings overshadow adjacent one-story structures.

e. *Faulty Exterior Spacing*

Buildings located too close together or covering excessive portions of their lots reduce accessibility for deliveries, emergency fire apparatus, light and air circulation between structures. In this respect, many of the

commercial structures and many of the multi-family structures (those located in the area bounded by Industrial, Sahara, Commercial and Wyoming, in particular) cover most of their lots and/or are built to their lot lines. This development pattern: (1) limits offstreet parking; (2) creates parking conflicts with traffic flows; (3) blocks access for firefighting purposes; (4) inhibits fire fighting abilities; and (5) results in shadows being cast upon adjacent structures.

* * *

Finally, when looking at the Redevelopment Area as a whole, it was determined that approximately 40% of all streets in the Area are inadequate and need to be replaced and/or upgraded. Street lighting is also inadequate or non-existent in certain portions of the Area.

b. *Lots (Parcels) of Irregular Form, Shape, and Size*

Approximately 12% of the Area contains lots of irregular form and shape. In addition, a large number of lots are of inadequate size for proper usefulness and development. Although, historically, such layouts were adequate for development, as the City has grown, these parcels have resulted in limited space utilization and expansion capabilities. Additionally, large numbers of small lots produce highly fragmented ownership patterns which serve as deterrents to commercial redevelopment.

c. *Lots (Parcels) Laid Out in Disregard to Contours, Topography, Physical Characteristics, and Surrounding Conditions*

Given the fact that the topography in the Redevelopment Area is virtually flat, there are no significant instances of incompatible lot line relationships to local contours (1.5%). However, the natural water flow pattern in the City (west to east) results in some flood control problems for the Area, which is located on the easterly end of the water flow pattern.

During rain storms, several portions of the Area are highly impacted by flooding problems. In these instances, not only are streets submerged, but lots and commercial parking areas send to become submerged as well.

C. *EXISTING SOCIAL CONDITIONS*

1. *Redevelopment Area Population*

The demographic data presented in the following subsections was obtained from the 1980 Census for the City of Las Vegas and is a comparison of the population characteristics of the Redevelopment Area as they relate to the City as a whole.

* * *

b. *Overcrowding*

Overcrowding is generally expressed in terms of persons per room. A measurement of 1.01 persons per room or greater is generally considered a sign of overcrowding. When viewing the City as a whole, it has been determined that approximately 6% of

all occupied units are considered overcrowded.

Although there isn't any specific data related to the number of persons per room in the Redevelopment Area, there are indications of overcrowding. When looking at the number of households in the Area (13,830) as compared to the number of occupied housing units (12,141), it is apparent that there are approximately 1.2 households for every housing unit. This compares with a City average of approximately 0.9 households for every housing unit.

c. *Physical Conditions*

Within the Redevelopment Area, it has been determined that approximately 52.5% of all structures were constructed between 1950 and 1969. As such, over half the Area's housing stock is at least 17 years old. With age, of course, comes the natural progression of structural deterioration. Depending on individual maintenance efforts, it was observed that there are varying degrees of deterioration of the housing stock in the Redevelopment Area. Structural deficiencies are most prevalent in many of the multi-family structures in the area bounded by Wyoming, Industrial, Commerce and Sahara, as well as in those portions of the Redevelopment Area where "mixed uses" exist in various blocks. Overcrowding is also evident in the Redevelopment Area, particularly in the just-mentioned area, and, as a consequence, is a contributor to the poor physical condition of many of the Area's housing units.

* * *

3. *Prevalence of Social Maladjustment*

According to data provided by the Las Vegas Metropolitan Police Department, the Redevelopment Area is plagued by those types of crimes typical to urban downtown areas. Most prevalent are "Crimes Against the Person" such as pickpockets, purse snatchers, assaults, robberies, auto thefts and larceny. In addition, Metro has indicated that there are instances of narcotics trafficking and associated crimes.

Another problem that exists is the presence of vagrants, with loitering and panhandling being prevalent.

In addition, Metro has indicated that a large number of crimes go unreported in certain segments of the Redevelopment Area because of the high number of immigrants residing in those areas. Fear and the lack of trust of law enforcement officials is the dominant reason sited.

D. *EXISTING ECONOMIC CONDITIONS*

1. *Businesses Located in the Redevelopment Area*

The Central Business District (CBD) of Las Vegas is located within the Redevelopment Area. As is typical of most CBD's in other cities, the CBD in the Redevelopment Area has served as the center for financial, business, professional office, and civic uses. However, in recent years, there has been a trend toward locating businesses outside of the downtown area. Newer major commercial corridors have sprung up along Flamingo,. West Sahara and the Tropicana and Eastern areas. Those businesses remaining in the downtown area tend to be those directly

affiliated with certain service types, i.e. – small legal offices adjacent to Court facilities, small volume retail outlets servicing an adjacent populace; title companies adjacent to main Branch bank offices, etc. In most instances, new, upscale businesses tend to establish themselves in the outlying areas of the Las Vegas community where newer commercial corridors exist.

The majority of the current uses in the CBD are dedicated to the hotel/casino industry and other ancillary services. There are no large retail trade outlets nor any large supermarkets to support the population of the Redevelopment Area. Additionally, there are relatively few eating establishments other than those directly situated within the hotel/casinos in the area.

2. *Economic Dislocation and Disuse from Faulty Planning*

Both local governments and businesses develop plans to assure orderly growth; however, because such plans occasionally fail to accurately forecast future conditions, they can result in economic dislocation and disuse.

a. *Inappropriate Existing Land Uses*

Section III(B) of this Report to the City Council noted the existence of mixed and/or incompatiable land uses within the Redevelopment Area. Most notable is the intermingling of residential, commerical and office uses in various sections of the area. These "mixed" land uses can cause incompatibility problems such as congestion and negative aesthetics. Another consequence is that it creates an undesirable environment inhibiting future development.

When public planning decisions allow inappropriate land uses to develop, the immediate or ultimate effect is economic dislocation or disuse. These effects are clearly evident in the Redevelopment Area, where the orderly expansion of commercial enterprises has been thwarted by the presence of numerous small residential parcels scattered among and between existing commercial uses. This use pattern has inhibited the ability of local businesses to provide additional floor space and/or off-street parking areas to compete in the regional marketplace, and has resulted in the gradual loss of business to more modern commercial centers in neighboring communities.

Another form of inappropriate land use in the Redevelopment Area is the presence of several areas of underutilized land (especially Upland Properties). These lands have remained undeveloped because: 1) they lack adequate utilities, drainage, and access improvements; and 2) the cost of providing such improvements are beyond the means of private developers operating alone.

b. *Business Stagnation or Failure*

Several of the commercial businesses within the Redevelopment Area are stagnating or beginning to decline because of competition from outside the area. Additionally, many businesses have failed altogether, and the buildings or properties they previously occupied are now standing vacant. While numerous reasons exist for such stagnation and failure, faulty planning relating to

inadequate land for expansion, poor accessibility, etc., is undoubtedly a contributing factor which has driven both businessmen and their patrons to larger, more modern commercial centers in other areas.

Among those businesses that have moved out of the Redevelopment Area within the past ten years, several major employers were included. These include: 1) First Western Savings (relocation of administrative offices); 2) CENTEL (relocation of all operations); 3) Nevada Power (relocation of administrative offices); 4) J.C. Penney (relocation of all retail sale operations; 5) Garrett's Furniture (relocation of all retail sale operations); and 6) Nevada Savings (in process of relocating administrative offices).

3. *Prevalence of Economic Maladjustment*

An area is economically maladjusted when it is simultaneously suffering from several economic ills, such as those described herein. Retail sales are stagnating, businesses are failing and vacancy rates are increasing. All of these problems exist with the Redevelopment Area.

Economic maladjustment has a substantial impact on the public sector as well. As an area declines, the community begins to experience accelerating costs for providing services and possible reductions in property and sales tax revenues. Without a concrete plan for reversing these trends, the Redevelopment Area will continue to deteriorate.

* * *

* * *

VIII. ATTACHMENTS

* * *

PHOTOGRAPHS OF VARIOUS SITES IN DOWNTOWN REDEVELOPMENT AREA

[Photographs omitted]

(1) Burned and vacant hotel, corner of Seventh and Stewart. Site is two blocks from Las Vegas Blvd. South ("Strip"); City Hall is in background.

(2) Vacant Motel, 900 block of West Bonanza. Site is used by transients for evening shelter.

(3) Oslo House, corner of 8th and Ogden. Former "flop-house," building is now closed. Building has been vacant for over a year.

(4) Abandoned apartment buildings near First Street and Washington Avenue.

* * *

(11) Corner of Fremont Street and Las Vegas Blvd. (southeast side). Most store fronts are empty.

* * *

(32) Main Street, north of Fremont. Vacant high rise hotel structure. Building has been vacant for approximately one year.

* * *

(40) Third Street, just north of Ogden. Vacant building.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, Appellant, CAROL PAPPAS, JOHN PAPPAS, HARRY PAPPAS, ADRIENNE LOBELLO, AND FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, Respondents.	)	No. 39255

RESPONDENTS' ANSWERING BRIEF AND CROSS APPEAL OPENING BRIEF

GLADE L. HALL, ESQ.
Nevada Bar #1609
105 Mt. Rose St.
Reno, Nevada 89509
(775) 324-6447

A. GRANT GERBER, ESQ.
Nevada Bar #2304
491 4th Street
Elko, Nevada 89801
(775) 738-9258

Attorneys for Respondents

* * *

[13] proceeding and applied the language of Berman[8] that, "subject to specific constitutional limitations when the legislature has spoken, the public interest has been declared in terms well nigh conclusive." With the emphasis implied herein, the court further recites the language from *Schroeder v. Third Judicial District Court* to the effect hat, "when the sovereign power attaches conditions to its exercise the inquiry whether the conditions have been observed is a proper matter for judicial cognizance." (58 Nev. 188, 195) (2820)

The court then concludes that condemnation is a constitutionally sensitive proceeding that requires strict compliance with the constitution and all statutes and that the statutes must therefore be strictly construed in favor of the landowner and against the condemning party. *Citing City of Cincinnati v. Vester*, 281 U.S. 439 (1930) Id.

As to standard of review the district court distinguishes the urban renewal cases, then concludes that the redevelopment act require strict compliance with the statutes in order to function and does not provide for the unrestricted use of eminent domain referring specifically to the language in N.R.S. 279.424 (2) that the use of eminent domain is only allowed when, "the redevelopment of blighted areas cannot be accomplished by private enterprise alone." The district court further relies on N.R.S. 37.010 (17) which empowers the agency to exercise eminent domain and designates redevelopment as a public use, only as to the acquisition of property conducted pursuant to N.R.S. 279.382 to 279.685. Based on *Southern*

---

[8] *Berman v. Parker*, 248 U.S. 26 (1954).

Nevada Home Builders Association Inc. v. City of North Las Vegas, 112 Nev. 297, 913 P.2d 1276 (1996), the

* * *

[69] "bridle" the Agency's power. That is what the district court did. That action should be affirmed by this Court.

Respectfully submitted this 25th day of September, 2002.

/s/ Glade L. Hall
Glade L Hall
Attorney for Appellants
Nev. Bar #1609
105 Mt. Rose St.
Reno, Nevada 89509
(775) 324-6447

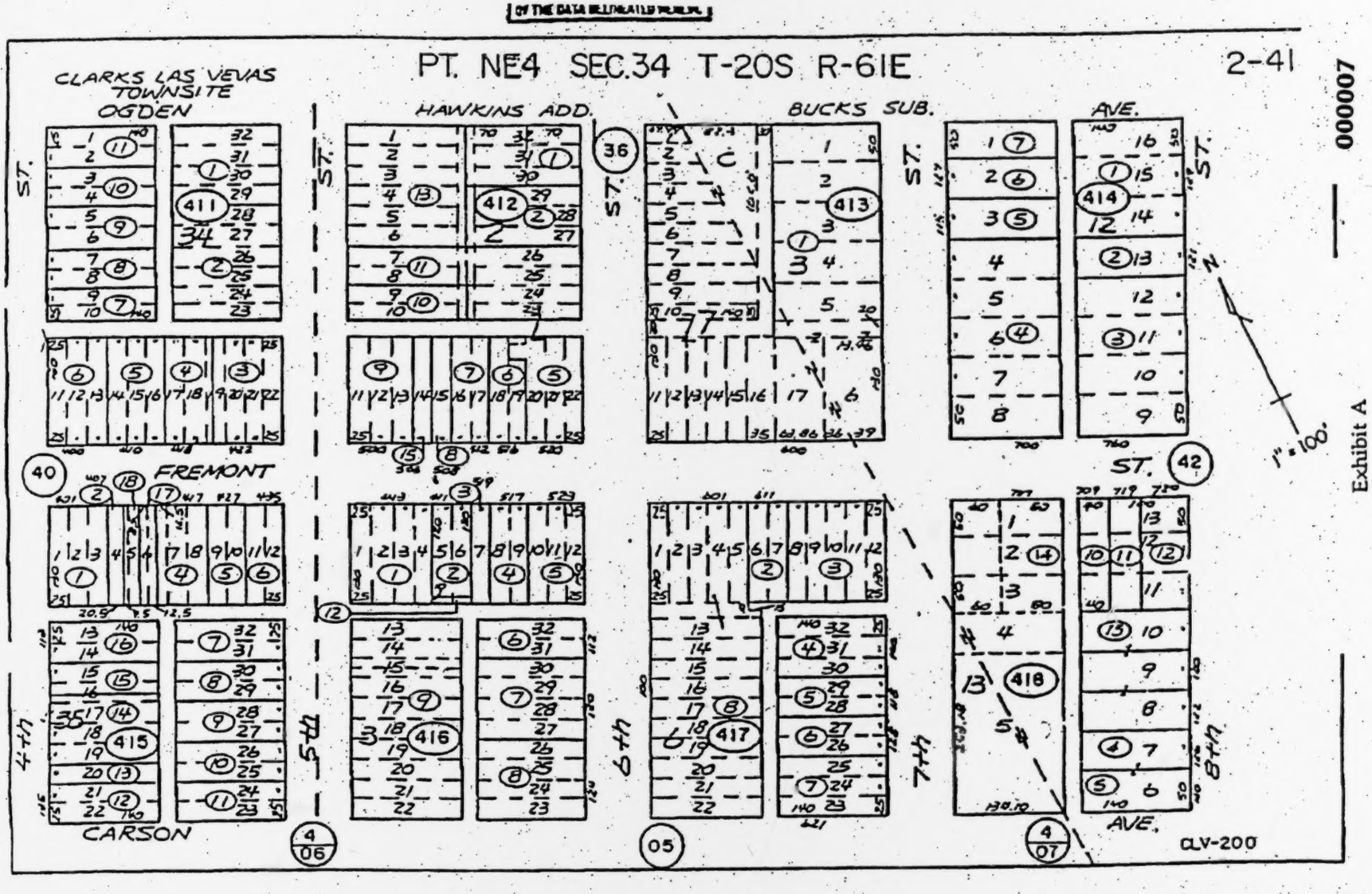

Exhibit A

000007

(6)

No. 03-972

Supreme Court, U.S.
FILED
FEB 17 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CAROL PAPPAS, JOHN H. PAPPAS, JR., and HARRY J. PAPPAS,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, and FREMONT STREET EXPERIENCE PARKING CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF

BARRY LEVENSTAM
Counsel of Record
JEREMY M. TAYLOR
JOHN W. JOYCE
MELINDA E.A. CUPPS
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. Respondents' Reliance On Purported Blight Findings That Do Not Pertain To The Pappas Family Property Or Adjacent Properties Merely Frames The Important Questions Presented By The Decision Below Concerning What Constitutes, And Who Determines, "Public Use." 1

II. Although Respondents Dispute The Existence Of A Conflict, Their Own Arguments Establish That A Conflict Exists. 3

III. Matters Of State Law Provide No Reason To Deny This Petition. 5

A. The Pappas Family Did Not Delay In Raising The Issues Set Forth In Their Petition 5

B. The Nevada Statutes Do Not Insulate This Taking From Constitutional Challenge Or From This Court's Review 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Berman v. Parker, 348 U.S. 26 (1954) ..... passim

Citizens' Savings & Loan Ass'n v. Topeka, 87 U.S. (20 Wall) 655 (1874) 3, 7

City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court, 5 P.3d 1059 (Nev. 2000) 7

Dolan v. City of Tigard, 512 U.S. 374 (1994) 3

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) ..... passim

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) 3

Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 768 N.E.2d 1 (Ill. 2002) ..... passim

Urban Renewal Agency of City of Reno v. Iacometti, 370 P.2d 446 (Nev. 1963) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... passim

STATUTES

Nevada Community Redevelopment Law, Nev. Rev. Stat. Chap. 279 6

PUBLICATIONS

George Bernard Shaw, *Everybody's Political What's What?* Chap. 30 (1944), *quoted in The Columbia World of Quotations* #53527 (1996) 7

I. Respondents' Reliance On Purported Blight Findings That Do Not Pertain To The Pappas Family Property Or Adjacent Properties Merely Frames The Important Questions Presented By The Decision Below Concerning What Constitutes, And Who Determines, "Public Use."

Respondents attempt to avoid this Court's review by hiding this economic redevelopment taking behind purported "findings" of blight made by the City Council, acting as respondent Agency. This attempt fails for several reasons, the first and foremost being that those findings do not relate to the Pappas Family property, or to the block on which the Pappas Family property sits, or to any of the blocks surrounding the block on which the Pappas Family property sits. No link exists between those purported findings and the taking of the Pappas Family property – they are separated by seven years in time and by an undisclosed but significant geographical distance.

Respondents argue generally that blight existed "in the downtown redevelopment area." Opp. at 10. But they cannot seriously contend that blight existed on the Pappas Family property, or on its block, or on the blocks surrounding it (some of which are occupied by respondent LLC's casinos) because the Agency's own survey in the record below and the rulings of the courts below establish beyond any question the absence of blight in the immediate area of the Pappas Family property. For example, the trial court found:

> It was not until November 19, 1985, weeks after the resolution of necessity, that the City had its employees conduct block surveys of the targeted area to determine the overall conditions in the target area. Moreover, none of the block surveys completed by the City, and submitted to this Court, indicate any findings of blight.

Pet. App. at 47a. Further, the trial court found that respondents "did not produce one report that showed that the block upon which the Pappas property is situated was ever surveyed, let alone blighted . . . and the property directly surrounding the Pappas block were hotels that the survey described as 'major hotels. O.K.'" *Id.* at 80a. Thus, the trial court concluded that the Respondents' blight findings were "unreliable" and "arbitrary." *Id.*

The Nevada Supreme Court likewise did not conclude that the Pappas Family property or the property adjacent to it was blighted. Indeed, the majority opinion did not take issue with the description of the Pappas Family property in Justice Leavitt's dissent:

> The Pappases' property was not a slum. The City's survey gave no indication that the property was blighted in any way. There certainly were no conditions injurious to the public health, safety, morals and welfare. The property was adjacent to a savings and loan building and across the street from a bank.

Id. at 31a.

Rather, informed by its reading of *Berman v. Parker*, 348 U.S. 26 (1954), that the condemning authority's determination of public use is "'well-nigh conclusive,'" Pet. App. at 2a, and by its reading of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), that courts must defer unless that authority's findings "involve an impossibility," Pet. App. at 14a-15a, the Nevada Supreme Court held that the trial court had not given sufficient deference to the respondent Agency's findings of blight, *id.* at 22a.

But this merely frames squarely the question whether the Fifth Amendment permits such judicial abdication to a local condemning authority's decision to take non-blighted property from one private citizen and give it to another. *See* Pet. at 19-30, citing, *inter alia*, *Dolan v. City of Tigard*, 512 U.S. 374, 391-92 (1994); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972); *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874). This Court should take this case to answer that question.

II. Although Respondents Dispute The Existence Of A Conflict, Their Own Arguments Establish That A Conflict Exists.

Unable to dispute the absence of blight on the condemned block in which the Pappas Family property sits, respondents cite *Berman* for the proposition "that whether or not blight exists on a particular parcel of land within an otherwise blighted redevelopment area is irrelevant to the question of whether a taking of that parcel is constitutional." Opp. at 11. This is precisely the argument raised by the condemning authority in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002) ("*SWIDA*"). The *SWIDA* case is almost identical to this one, except that in *SWIDA* a racetrack corporation, rather than a casino cartel, obtained a next door neighbor's non-blighted property for a parking lot through condemnation justified by blight elsewhere in the area. Indeed, in language almost identical to that used by respondents here, the Development Authority in *SWIDA* also attempted to support its taking of non-blighted property by arguing, based on *Berman*: "the fact that a given parcel is not blighted is not relevant where there is a purpose to eliminate blight in the area . . . ." *SWIDA*

Appellant's Br. at 28.

This case and *SWIDA* are factually the opposite of *Berman*. In *Berman*, one operating business located in the midst of terrible blight was taken along with all the surrounding blighted properties as a part of "integrated plans," 348 U.S. at 35, to rid the District of Columbia of that blight. In contrast, *SWIDA* and this case each involved a narrowly-focused taking *only* of valuable non-blighted property for the claimed purpose of remedying distant, unspecified blight; the supposedly blighted properties are not even identified, much less condemned.[1]

The Illinois Supreme Court soundly rejected the argument that nonblighted property may be taken so long as blight exists somewhere in the vicinity: "While we do not deny that this expansion in revenue [from the racetrack's use of the condemned property] could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government." 768 N.E.2d at 10-11.

In sharp contrast, the Nevada Supreme Court credited the argument advanced by both the Development Authority in *SWIDA* and the Agency here, upholding the taking as constitutional because "the Pappases failed to establish that downtown Las Vegas [*not* their own property or even the surrounding blocks] no longer suffered from physical, social, or economic blight at the time of the eminent domain

---

[1] *Berman* provides no more support for this taking of only non-blighted property than *Midkiff* provides support for taking properties from small businesses and handing them over to the oligopolistic cartel of casinos that already owns most of downtown Las Vegas.

proceedings." Pet. App. at 24a. In Nevada, therefore, the owner of nonblighted property cannot stop a condemning authority from taking his property and giving it to his wealthier next door neighbor without proving that his city is free of social ills.

That Nevada and Illinois are at crossed swords over the public use protection of the Fifth Amendment's Takings Clause cannot be gainsaid.[2] This Court should take this case to resolve this stark conflict.

III. Matters Of State Law Provide No Reason To Deny This Petition.

A. The Pappas Family Did Not Delay In Raising The Issues Set Forth In Their Petition.

Respondents complain that the Pappas Family delayed in raising their challenges to the taking until "the parking garage had already been constructed." Opp. at 7. They overlook the fact that respondent Agency served the widowed Mrs. Pappas pleadings that failed to provide adequate notice of its motion for possession, and then seized the opportunity at the *ex parte* hearing (before a judge who had an interest in seeing the taking succeed) to misrepresent that the Pappases did not object to the turnover of possession, so that the Pappases' building was demolished before they could react. *See* Pet. App. at 58a-61a.

More important, respondents presented their waiver and estoppel arguments in the state courts below. The Nevada courts rejected those state law arguments and addressed the federal constitutional issues on the merits. *Id.* at 11a-12a.

---

[2] *See* Motion for Leave To File Brief of *Amici Curiae* Paul and Laurel A. Moldon at 8-13 (demonstrating that this conflict is "just the tip of the iceberg").

Respondents also complain that "the Pappases raise for the first time in their petition to this Court the claim that *Berman* and *Midkiff* should be reconsidered and that a heightened level of scrutiny should be applied to takings under the Fifth and Fourteenth Amendments." Opp. at 7-8. Of course the Nevada courts can neither reconsider this Court's decisions nor select the standards for evaluating federal constitutional claims. Nevertheless, the Pappas Brief to the Nevada Supreme Court included a lengthy section entitled "This Court Should Reexamine And Limit The Applicability Of Iacometti and Berman," Respondents' Answering Br. at 27-32,[3] and another section arguing against broad judicial deference to the Agency's determination, entitled "There Was No Error In Not Deferring To The Agency's 'Interpretation,'" *id.* at 55-56. Consequently, this argument is also meritless.

B. The Nevada Statutes Do Not Insulate This Taking From Constitutional Challenge Or From This Court's Review.

Respondents place great weight on the enactment by the Nevada legislature of Nev. Rev. Stat. Chapter 279, which respondent Agency invoked in condemning the Pappas Family property. Opp. at 4, 8-9, 12. But compliance with that statute does not insulate this taking from federal constitutional challenge. The Nevada Supreme Court recognized that fact, and the fact that the Pappases were advancing just such a challenge. Consequently, the Nevada Supreme Court squarely addressed the question whether this taking violated the United States Constitution and held that it did not. *See* Pet. App. at

---

[3]"Berman" refers to this Court's decision in *Berman v. Parker*, and "Iacometti" to *Urban Renewal Agency of City of Reno v. Iacometti*, 379 P.2d 466 (Nev. 1963), which relies on *Berman*.

29a.

Respondents further contend that the Nevada Supreme Court was correct in deferring to the Nevada legislature because the legislature is the "voice of the public" and "is uniquely suited to make determinations as to the best interests of the community it serves." Opp. at 12. But the Nevada legislature did not conduct this taking; the Las Vegas City Council did. The Las Vegas casinos who received the Pappas Family property have considerable political clout there – they gave so many campaign contributions locally that this case caused a "chain reaction" of recusals by judges in Las Vegas. *See City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 5 P.3d 1059, 1060 (Nev. 2000).[4]

The Fifth Amendment exists to protect individual property owners from the depredations of popularly elected government. As this Court stated, a government that holds "the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism." *Citizens' Savings & Loan Ass'n*, 87 U.S. (20 Wall.) at 662. The popularity of this taking among City Council members is no gauge of its constitutionality.

CONCLUSION

The Las Vegas City Council, acting as respondent Agency,

---

[4]As George Bernard Shaw observed, "A government which robs Peter to pay Paul can always depend upon the support of Paul." *Everybody's Political What's What?* Chap. 30 (1944), *quoted in The Columbia World of Quotations* #53527 (1996).

took a single city block of properties that were neither blighted nor adjacent to blight from small business owners and gave that block to a cartel of the wealthiest and most powerful property owners in Las Vegas. The expressed purpose of this taking was to remedy blight elsewhere in the downtown area. This taking finds no support in the direct holdings of *Berman* and *Midkiff*, the facts of which differ from this case like night and day. Rather, this case presents a quintessential "economic redevelopment" taking – a taking not to clear slums, but to provide, in the words of the Nevada Supreme Court, "an anchor for revitalization of the entire downtown." Pet. App. at 19a.

There is no question that economic redevelopment takings have reached "pandemic" proportions across this country. *See* Motion for Leave To File Brief of *Amici Curiae* Paul and Laurel A. Moldon at 5-8 & n.2. There are, however, very serious questions concerning whether *Berman* and *Midkiff* can be read to support such a taking and, if so, whether those cases must be reconsidered and limited, because the Public Use limitation in the Takings Clause of the Fifth Amendment to the United States Constitution does not permit such takings.

This Court should grant this Petition, issue the Writ of Certiorari, and address these questions now.

Barry Levenstam
Counsel of Record
Jeremy M. Taylor
John W. Joyce
Melinda E.A. Cupps
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

February 17, 2004

MOTION FILED
FEB 6 - 2004

No. 03-972

IN THE
Supreme Court of the United States

CAROL PAPPAS, *et al.*,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* PAUL AND LAUREL A. MOLDON IN SUPPORT OF PETITIONERS

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

Dated: February 6, 2004

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Amici curiae Paul and Laurel A. Moldon hereby respectfully move for leave to file the following brief in support of the petition for certiorari. Petitioners have consented to the filing of this brief. Respondents have refused consent.

The interests of *amici* in this case arise from their ownership of property in Las Vegas that was condemned by respondent Las Vegas Downtown Redevelopment Agency to be given to a private casino. Although the property contained a viable commercial building that provided substantial income to the Moldons, and was not even remotely blighted, it was coveted for unspecified purposes by the casino and hence was targeted for appropriation. Following an initial appeal on statutory issues, their case is now pending back in the state trial court on public-use and just-compensation issues. Given that they have been subject to the same or even worse abuse of the eminent domain power by the Las Vegas Downtown Redevelopment Agency as have petitioners, *amici* have a direct and immediate interest in the issues presented by the petition and in the enforcement of the "public use" restriction on the taking of private property. This brief will focus on the nationwide importance of the questions presented, the division among the courts, and some proposed solutions for judicially enforcing the "public use" limit on takings authority.

Respectfully Submitted,

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
Counsel for Amici Curiae

Dated: February 6, 2004.

TABLE OF CONTENTS

Pages

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE PETITION RAISES IMPORTANT AND RECURRING ISSUES THAT SHOULD BE ADDRESSED BY THIS COURT. 5

II. THE PETITION RAISES QUESTIONS REGARDING THE SCOPE OF THE "PUBLIC USE" REQUIREMENT FOR TAKINGS THAT HAVE DIVIDED THE COURTS. 8

III. THIS COURT SHOULD READ NARROWLY THE SCOPE OF ANY SUPPOSED "PUBLIC USE" THAT CAN BE USED TO JUSTIFY A TRANSFER OF PROPERTY FROM ONE PRIVATE PARTY TO ANOTHER PRIVATE PARTY. 13

CONCLUSION 17

TABLE OF AUTHORITIES

Pages

Cases

Allydon Realty v. *Holyoke*, 23 N.E.2d 665 (Mass. 1939) 15

Baycol, Inc. v. *Downtown Dev. Auth.*, 315 So.2d 451 (Fla. 1975) 12

City of Center Line v. *Chmelko*, 416 N.W.2d 401 (Mich. App. 1987) 9

City of Lansing v. *Edward Rose Realty*, 502 N.W.2d 638 (Mich. 1993) 12

City of Owensboro v. *McCormick*, 581 S.W.2d 3 (Ky. 1979) 10, 11, 12

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 14

Hawaii Housing Auth. v. *Midkiff*, 467 U.S. 229 (1981) 14

In re Petition of Seattle, 638 P.2d 549 (Wash. 1981) 13

Karesh v. *City of Charleston*, 247 S.E.2d 342 (S.C. 1978) 13

Mayor v. *Thomas*, 645 So.2d 940 (Miss. 1994) 9

Southwestern Illinois Development Authority v. *National City Environmental*, 768 N.E.2d 1 (Ill.), *cert. denied*, 537 U.S. 880 (2002) 9, 16

United States v. *Lopez*, 514 U.S. 549 (1995) 14

United States v. *Morrison*, 529 U.S. 598 (2000) 15

Wilmington Parking Auth. v. *Land With Improvements*, 521 A.2d 227 (Del. 1987) 12

Other Authorities

26 AM. JUR.2D EMINENT DOMAIN § 34 (1966) 12

Associated Press, *Lawsuit filed over tax incentive for Wal-Mart,* Miami Herald, Sept. 17, 2003 (available at http://www.miami.com/mld-/miamiherald/business/6789539.htm) 7

Bates, *Eminent Domain Abuse in Alabama*, Bates Line, Aug. 22, 2003 (available at http://www.batesline.com/archives/000175.html) 7

Dana Berliner, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (Institute for Justice, April 2003) 6

Daniels, *Shelby court may hear land case*, Birmingham News, Aug. 25, 2003 (available at http://www.propertyrightsresearch.org/articles3-/shelby_court-_may_hear_land_case.htm) 7

Eminent domain: the nationwide epidemic, Issues & Views, Oct. 6, 2003 (available at http://www.enquirer.com-/editions/2002/12/23/loc_blight23.html) 7

Greenhut, *The Blight of Eminent Domain*, The Freeman: Ideas on Liberty, Sept. 2002 (available at http://www.fee.org/vnews.php?nid=5160) 8

Marks, *Eminent domain and private gain*, Christian Science Monitor, May 9, 2003 (available at http://www.csmonitor.com/2003/0509-/p01s03-ussc.html) 7

Porteus, *Homeowners Battle to Keep Their Property*, Fox News Channel (online), May 2, 2003 (available at http://www.foxnews.com-/story/0,2933,85753,00.html) 8

Swinton, A DICTIONARY OF (ECOLOGICAL) EPIDEMIOLOGY (2002) (http://www.swintons.net/jonathan/Academic/glossary.html) 5

Vela, *Threatened homeowners ask: What is blight?*, Cincinnati Enquirer, Dec. 23, 2002 (available at http://www.enquirer.com-/editions/2002/12/23/loc_blight23.html) 7

Witt, *Power to seize property a political morass*, The Mercury News, June 30, 2002 (available at http://www.mercurynews.com/mld-/mercurynews/news/editorial/3575061.htm) 8

IN THE

Supreme Court of the United States

CAROL PAPPAS, *et al.*,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

INTEREST OF *AMICI CURIAE*[1]

Amici Paul and Laurel Moldon are the owners of property in Las Vegas that was condemned by the Las Vegas Downtown Redevelopment Agency to be given to a private casino. Although the property contained a viable commercial building that provided substantial income to the Moldons, and was not even remotely blighted, it was coveted for unspecified purposes by the casino and hence was targeted for appropriation. In 1995, the Redevelopment Agency filed a motion for immediate possession of the property which was granted and

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

the property was then given to the casino. The tenants of the property were promptly evicted and the Moldon's livelihood was destroyed.

Although the order of possession was reversed later that year, and the property nominally returned to the possession of the Moldons while the case was pending, only one former tenant returned and then only at a drastically reduced rent. The ongoing condemnation proceedings and the active interference of the Redevelopment Agency and the casino have since prevented the Moldons from making any viable use of the property and thus they were left stuck with a half-dead albatross around their necks – forced to pay property and sewage taxes yet blocked from reaping economic advantage from the property.

Following an initial appeal on statutory issues, their case is now pending back in the state trial court on public use and just compensation issues. During this time, the Moldons have yet to receive a penny of compensation for the unlawful taking and *de facto* destruction of their investment. Despite having been taken under the guise of redevelopment and the elimination of blight, the land is not, and has never been, part of any redevelopment plan. The casino, meanwhile, has completed its project, has not even *proposed* any development of the Moldons' property, yet continues to covet it and refuses to relinquish its claim. The condemnation thus amounts to nothing more than the naked appropriation of property for transfer to a new private owner without even an inkling of what use would be made of it. In all likelihood the new owners eventually intend to sell all or part of the property arbitraging the difference between the artificially depressed price they will have to pay in the context of condemnation and the much higher price available in the market.

Given that they have been subject to the same or even worse abuse of the eminent domain power by the Las Vegas Downtown Redevelopment Agency as have petitioners, *amici* have a direct and immediate interest in the issues presented by

the petition and in the enforcement of the "public use" restriction on the taking of private property.

SUMMARY OF ARGUMENT

1. The taking of non-blighted property from one private owner for transfer to another private owner under the guise of "redevelopment" is a rapidly growing phenomenon that has spread like a plague across the country. A study by the Institute for Justice identified over 10,000 publicly reported actual or threatened condemnations for the benefit of private recipients from 1998-2002, and noted that such number likely underestimated the phenomenon by an order of magnitude or more. The sheer numbers and geographic scope of such takings and the tremendous value of that quantity of property illustrate that the petition presents important and recurring issues that should be addressed by this Court. Indeed, the litigation burden alone from so many questionable takings and the lack of definitive limits on the scope of public use is reason enough to warrant this Court's attention.

2. In addition to the split regarding public use identified in the petition, numerous state courts have adopted narrower interpretations of what constitutes a "public use" by interpreting that phrase as it appears in their own constitutions and statutes. As a practical matter, those cases interpreting state law analogues to the federal Constitution's "public use" requirement should be considered as part of the "split" justifying a grant of certiorari because courts having such narrow views of public use in general will rarely or ever find it necessary to even reach the federal constitutional question. Virtually every state has a Fifth Amendment analogue requiring that takings be for "public use" and hence property-protective states will always have a prior state-law ground for decision.

The no-public-use side of the split, therefore, will almost always have to be represented by state-law cases. It is only those state courts with a generally broad view of public use that will ever even need to reach the federal question at all

after upholding a taking as being for a valid "public use" under state law, and such courts will invariably interpret the federal requirement in the same broad manner as they interpreted their state requirement. What is important in the concept of a split, however, is that the result in this case would have been different in any of the states that have a narrower view of public use, regardless of the nominal source of the public-use requirement. That split in results on the conceptually identical issue of public use warrants this Court's attention.

3. A workable and administrable solution to the questions presented in this petition requires that the scope of the takings power be tied to the actual language of the Constitution and hence to some identifiable public *use*, not merely to some incidental public benefit from private use of the taken property. Any transfer of property to private parties must be no more than incidental to such a public use. For takings of so-called "blighted" property, the taking must include only such property as itself is blighted and non-blighted property that is *necessary* to the taking of the blighted property itself. And blight in such circumstances should be limited to conditions approximating a nuisance, not merely the absence of some favored use. Finally, insofar as public use is to be tied to some indirect public benefit, the links in the chain of causation must be kept extremely limited in order to preserve some meaningful difference between private and public use. The trickle-down theory that private benefit begets public benefit would destroy any such meaningful difference, and hence cannot be the basis of a claim for public use.

ARGUMENT

I. THE PETITION RAISES IMPORTANT AND RECURRING ISSUES THAT SHOULD BE ADDRESSED BY THIS COURT.

The exercise of the power of eminent domain to transfer property from one private owner to another is a widespread and recurring phenomenon. And with increasing frequency, government coercion of the transfer of property between private parties is being justified not on the basis of some fatal flaw in the property under the original owner – such as blight or nuisance – but rather in pursuit of economic redevelopment: the notion that some new owner would make a supposedly "better" use of the property than the existing owner. In virtually every instance, such takings are subject to the identical claim raised by the petition: That taking non-blighted property from one private owner and giving it to a preferred private owner does not constitute a "public use" of such property regardless of any incidental benefits such a change in ownership may have.

Petitioners in this case aptly note that "redevelopment" takings are "becoming an epidemic." Pet. 12. That description is, if anything, an understatement.[2] A recent study by the Institute for Justice, for example, found that between 1998 and 2002 there were over 10,000 filed or threatened condemnations for private parties in 41 States. Dana Berliner, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN

---

[2] An "epidemic is usually heralded by an exponential rise in the number of cases in time and a subsequent decline as susceptible numbers are exhausted." Swinton, A DICTIONARY OF (ECOLOGICAL) EPIDEMIOLOGY (2002) (http://www.swintons.net/jonathan/Academic/glossary.html). A "pandemic," by contrast, is an epidemic "widely distributed in space." *Id.* The spread of private-use takings is worse still, given that not only is it widely distributed throughout the country, but it also shows no sign of decline and in fact seems to be gaining still more momentum.

2 (Institute for Justice, April 2003).[3] The study also found an additional 4,000 properties that were then living under the threat of private-use condemnation. *Id.* And, as if those numbers were not enough to demonstrate a critical threat to property rights, the report notes that they "represent only a fraction of the number of cases where private property has been condemned for another private party." *Id.* Because the study compiled its figures from public sources, and because "many, if not most, private condemnations go entirely unreported in [the] public sources" used for the report, the true number of cases affected by the issues raised in the petition is likely an order of magnitude higher than the confirmed number given by the study.[4]

Less comprehensive, but no less telling, are the plethora of news reports from around the country decrying the torrent of takings instituted for the benefit of private parties under the

---

[3] In its state-by-state analysis, written before the decision by the Nevada Supreme Court in this case, the Institute for Justice study describes Nevada as "teetering on a precipice" of "either encouraging flagrant abuse or warning redevelopment agencies that there are limits to their power." PUBLIC POWER, PRIVATE GAIN, at 129. That characterization was based, in part, on the abuse suffered by petitioners the Pappases – which the report described as involving Redevelopment Agency behavior that "was so outrageous that it will be difficult for any court to approve," *id.* – and, in part, on the case involving *amici* the Moldons. *Id.* at 131. In deciding the *Pappas* case as it did, the Nevada Supreme Court elected to throw ordinary property owners in Nevada over that precipice, to be picked clean by the casinos and developers waiting below.

[4] The study gives the example of Connecticut, the only State that records the number of redevelopment condemnations, as listing 543 such condemnation proceedings between 1998 and 2002, as compared to the 31 instances identified and counted by the study from other sources. PUBLIC POWER, PRIVATE GAIN, at 2. And even that larger figure in Connecticut does not take into account instances in which the *threat* of a private-use condemnation was used to coerce a property owner into selling rather than face a ruinous and likely futile legal battle challenging an actual condemnation. Rather than 10,000 cases over a four-year period, the issues in this case more likely affect *hundreds of thousands* of cases over such a period.

guise of "redevelopment." *See, e.g.*, Associated Press, *Lawsuit filed over tax incentive for Wal-Mart,* Miami Herald, Sept. 17, 2003 (suit "accuses Birmingham of improperly using eminent domain to force property owners to sell" to Wal-Mart for purpose of building a new store) (available at http://www.miami.com/mld/miamiherald/business/6789539.htm)[5]; Daniels, *Shelby court may hear land case*, Birmingham News, Aug. 25, 2003 (noting that the City of Alabaster, Alabama is moving to use eminent domain to take land from nine families so it can be used for a commercial development for Wal-Mart and several other large businesses) (available at http://www.propertyrightsresearch.org/articles3/shelby_court_may_hear_land_case.htm); Marks, *Eminent domain and private gain*, Christian Science Monitor, May 9, 2003 (Village of Port Chester, N.Y., used eminent domain to take four successful commercial buildings "so that another private developer could build part of a Stop & Shop and parking lot where [those buildings] sat") (available at http://www.csmonitor.com/2003/0509/p01s03-ussc.html); Vela, *Threatened homeowners ask: What is blight?*, Cincinnati Enquirer, Dec. 23, 2002 (noting that Norwood, Ohio is considering designating a well-maintained middle-class neighborhood as "blighted" as a prelude for takings on behalf of a commercial development and noting similar tactics in several other Greater Cincinnati communities) (available at http://www.enquirer.com/editions/2002/12/23/loc_blight23.html).[6]

---

[5] All web pages cited are as viewed on February 5, 2004. PDF versions of each of the cited web pages on the date viewed are on file with counsel and can be provided to the Court upon request.

[6] *See also Eminent domain: the nationwide epidemic*, Issues & Views, Oct. 6, 2003 (discussing September 28, 2003, *60 Minutes* segment on abuse of eminent domain to transfer property between private parties; describing common strategy of declaring ordinary and valuable property "blighted" and an Ohio town's declaration that any home without 3 bedrooms, 2 baths and an attached 2-car garage was blighted) (available at http://www.issues-views.com/index.php/sect/25000/article/25069); Bates, *Eminent Domain Abuse in Alabama*, Bates Line, Aug. 22, 2003 (describ-

The sheer number and value of property being taken by local governments or special redevelopment agencies and given, lock, stock, and barrel, to favored private users amply demonstrates the importance of the issues raised by the petition. And the numerous cases contesting such abuses create a substantial legal burden on the courts that cries out for clear legal rules regarding what is or is not a "public use" sufficient to support the exercise of eminent domain. Because a ruling on the questions presented in the petition would affect so many current and future transactions and cases throughout the country, granting the petition would be an especially worthwhile and effective use of this Court's limited resources.

II. THE PETITION RAISES QUESTIONS REGARDING THE SCOPE OF THE "PUBLIC USE" REQUIREMENT FOR TAKINGS THAT HAVE DIVIDED THE COURTS.

Given the frequent occurrence and importance of the issues raised by the petition, it is no surprise that they arise in numerous cases and spawn conflicting results and rules among the lower courts. The petition notes the split between

---

ing land transferred by eminent domain to a developer in Alabama, examples in Oklahoma, and similar abuses in ten other states, including Nevada) (available at http://www.batesline.com/archives/000175.html); Porteus, *Homeowners Battle to Keep Their Property*, Fox News Channel (online), May 2, 2003 (describing efforts by New London (CT) development Corp. "to take property for various private uses" and discussing occurrence of same practice around the country) (available at http://www.foxnews.com/story/0,2933,85753,00.html); Greenhut, *The Blight of Eminent Domain*, The Freeman: Ideas on Liberty, Sept. 2002 (describing California city's plans to take property from a church and give it to developers to build a Costco retail center) (available at http://www.fee.org/vnews.php?nid=5160); Witt, *Power to seize property a political morass*, The Mercury News, June 30, 2002 (describing San Jose (CA) efforts to transfer property to private developers through eminent domain and wildly overbroad declarations of "blight") (available at http://www.mercurynews.com/mld/mercurynews/news/editorial/3575061.htm).

the decision below and the decisions in *Southwestern Illinois Development Authority* v. *National City Environmental*, 768 N.E.2d 1 (Ill.) ("*SWIDA*"), *cert. denied*, 537 U.S. 880 (2002), *Mayor* v. *Thomas*, 645 So.2d 940 (Miss. 1994), and *City of Center Line* v. *Chmelko*, 416 N.W.2d 401 (Mich. App. 1987). *See* Pet. 17-19. But that exposition of the conflict is just the tip of the iceberg. Numerous other cases have likewise have taken positions contrary to that of the Nevada Supreme Court regarding what constitutes a "public use" where property is taken from one private owner and given to another private owner.

Initially, it is worth noting that, in looking for a "split" on the issue of public use, this Court also should take into consideration cases finding no public use under state statutes or constitutions. As a practical matter, cases on the no-public-use side of the split will only be found in state-law decisions that rarely will reach the federal question. Virtually every State has a "public use" requirement in its own statutes and constitutions, hence insofar as a state court takes a narrower view than Nevada of what constitutes a public use, it will always be able to resolve the issue on state law grounds and have no need to proceed to the federal question even where the answer would be identical. Only cases that find a permissible public use under state law will ever be forced to reach the *federal* question of public use, and those cases invariably interpret the federal constitution as broadly as their existing interpretation of "public use" under state law. A literal "split" on the federal question, as distinct from the interpretation of analogous state provisions, thus is unlikely to arise because state law would always produce the same answer first where the use is deemed to be "private."

The correct comparison of public-use rulings, therefore, must include cases finding no "public use" regardless of the nominal source of the public-use requirement. What should be important for determining whether a split exists is that this and similar cases would have a different outcome in states

with a narrower view of public use than the Nevada Supreme Court. The differential interpretation of public use under *either* state or federal law raises the precise same inconsistency of results that is of concern to this Court in the case of literal splits on a federal question and, insofar as States with overly broad views of public use are exceeding the limits on their authority imposed by the Fifth and Fourteenth Amendments, they must be reined in by this Court regardless of whether the more property-protective States check unconstitutional private-use takings by relying on identically worded state provisions rather than on the federal Constitution *per se*.

With a proper understanding of what should constitute a split for purposes of demonstrating a need for certiorari, there are numerous additional cases finding that taking property to be given to a new private owner does not constitute a "public use." For example, the Kentucky Supreme Court, in *City of Owensboro* v. *McCormick*, 581 S.W.2d 3 (Ky. 1979), invalidated the condemnation of private land where, like here, the purpose was to turn that land over to private developers for commercial use. The court noted that the Kentucky Constitution required that private property could only be taken for "public use" and that requirement "has been consistently construed to forbid the taking of private property for private uses. *Id.* at 5. In rejecting the condemnation of "productive agricultural property for the sole purpose of private or industrial commercial development," *id.* at 6, the court held that:

> Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominately for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections * * *.

Id. at 5.

The Kentucky Supreme Court took a decidedly narrower view of public use than did the Nevada Supreme Court below, and expressly rejected the suggestion that "public use" was coextensive with any public purpose "for which public funds might be expended":

> The opportunity for tyranny, particularly by the self righteous, exists in condemnation of private property to a vastly greater degree than in the levying of taxes and the expenditure of public funds. The popular political response to abuse of the taxing and spending power is generally swifter and more effective than is true where the citizen's private property is effectively and finally taken from him. In our view, the constitutional provisions involved clearly require that finding of "public purpose" does not satisfy the requirement of a finding of "public use." We concur in the Court of Appeal's observation that "government cannot use the power of eminent domain in order to act as land broker for private interests."

Id. at 7. The court further endorsed a summary of "public use" that expressly distinguished the incidental public benefits of private development from the sort of public use necessary to support a taking of private property:

> "Generally, it may be taken as established law that the incidental benefit accruing to the public from the establishment of a large factory, mill, department store, or other industrial or commercial enterprise, is not a valid ground for ranking such an enterprise as a public use and entrusting it with the power to acquire a suitable site by eminent domain. Private enterprises that give employment to many and produce various kinds of commodities for the use of the people are not necessarily public uses. Every legitimate business, to a greater or lesser extent, indirectly benefits the public by benefiting the people who constitute the state, but that fact does not make such enterprises public businesses."

Id. (quoting 26 AM. JUR.2D EMINENT DOMAIN § 34, at 684-85 (1966)). It thus concluded that, in " the language used by the Court of Appeals, 'No "public use" is involved where the land of A is condemned merely to enable B to build a factory or C to construct a shopping center.'" *Id.* at 8.

Other courts similarly have rejected condemning property for transfer to private persons who were thought to have better uses for the property, concluding that such ensuing use and benefit was primarily private rather than public, notwithstanding some incidental economic benefit to the government. *See, e.g., Wilmington Parking Auth.* v. *Land With Improvements*, 521 A.2d 227, 231, 233 (Del. 1987) (discussing generally "whether a taking which results in a substantial benefit to private interests may nevertheless be for 'public use' as required by the State and Federal constitutions" and, in light of those constitutional principles and the subsidiary "primary purpose" rule, affirming the trial court's finding that the Parking Authority acted beyond its authority because it "was primarily motivated by the purpose of benefiting the City by retaining [a newspaper publisher] as a corporate citizen, and that the primary beneficiary of the project would be [the newspaper] rather than the public"); *Baycol, Inc.* v. *Downtown Dev. Auth.*, 315 So.2d 451, 455-58 (Fla. 1975) (noting that "eminent domain cannot be employed to take private property for a predominantly private use; it is, rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use"; holding that taking private property to be given to a private commercial development and to create parking for that private development did not constitute a public use); *City of Lansing* v. *Edward Rose Realty*, 502 N.W.2d 638, 641, 646 (Mich. 1993) (noting that both state and federal Constitutions mandate that "private property shall not be taken for public use without just compensation," and holding that a condemnation of property for use by a private cable company was beyond the City's au-

thority because "the primary beneficiary of this ordinance is [the cable company], a private user, not the public"); *Karesh* v. *City of Charleston*, 247 S.E.2d 342, 344-45 (S.C. 1978) (noting South Carolina Constitution's limitation on eminent domain to takings for "public use" and rejecting use of eminent domain in favor of developers of a hotel and convention center, refusing to "constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other private shopkeepers"); *In re Petition of Seattle*, 638 P.2d 549, 554-55 (Wash. 1981) (noting that under the Washington Constitution the "acquisition of land through eminent domain proceedings must be for a public use" and rejecting a condemnation of land for purposes of developing a private shopping center; court noted that a "beneficial use is not necessarily a public use," and concluded that "the proposed project contemplated a predominantly private, rather than public, use").

As the cases above illustrate, in numerous other jurisdictions the taking and transfer of the Pappases' property to a private consortium of casinos for their own commercial use would not have constituted a "public use" such as is necessary to support the exercise of eminent domain. For all practical purposes, therefore, the different outcome that would have resulted in other jurisdictions establishes a split on the issue of public use that warrants this Court's attention. That still *other* jurisdictions would undoubtedly have reached the same result as below only deepens the split on public use and increases the importance of taking this case to check such abuse of the power of eminent domain.

III. THIS COURT SHOULD READ NARROWLY THE SCOPE OF ANY SUPPOSED "PUBLIC USE" THAT CAN BE USED TO JUSTIFY A TRANSFER OF PROPERTY FROM ONE PRIVATE PARTY TO ANOTHER PRIVATE PARTY.

Correcting the ever-expanding abuse of the eminent domain power in the service of covetous private parties requires

a workable judicial solution that is both faithful to the language of the Constitution and capable of administration by the courts. Such a solution should have several characteristics.

First, the Court should give distinct substance and meaning to the requirement of "public use" as opposed to the baseline due process requirement that *all* government action must serve a public purpose. As this Court has had occasion to remind us, it is always important to "start with first principles." *United States* v. *Lopez*, 514 U.S. 549, 552 (1995). In this instance, the relevant first principle is that all words in the Constitution are presumed to have meaning. Conflating the "public use" requirement with any public purpose regardless of who ends up using the property would completely vitiate the meaning of the Fifth Amendment's discrete limitation on the government's power to take *property* as opposed to its power to act in general. As this Court has recognized in another context, the very act of enumeration of a particular power also constitutes a limit on such power. *Lopez*, 514 U.S. at 552 (*quoting* Federalist No. 45); *id.* at 553 ("'The enumeration presupposes something not enumerated'" (*quoting Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)).). In the case of eminent domain, government is only given the power to take property for the enumerated purpose of public use. That enumeration presupposes something not enumerated, and hence "private use" cannot be converted into a null set by the mere mantra that such use would fulfill some asserted public purpose. If it remains true that a "purely private taking could not withstand the scrutiny of the public use requirement," *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 245 (1981), then there must be a definition of public use that admits the existence and allows the identification of such private uses.

The natural import of the phrase "public use" thus should be made the anchor of any workable solution: The property taken must actually be *used* by the public, with the construction of government buildings or public parks and roads being

the most obvious examples. While some incidental transfer of property to private parties may be permissible, this Court should adopt a strong requirement that the transfer indeed be incidental to some actual use by the public, not merely the sole or even primary object and result of the taking. Thus, if after the completion of a public project on land taken by eminent domain the government is left with a slight excess of property that it then wishes to sell back to the private sector, that might well be an incidental transfer that was permissible. But if the initial take was substantially in excess of that needed for the public project itself, and a substantial purpose of the take was to transfer such property to preferred private owners, the condemnation, at least to the extent of the excess, would not be for public use.

Second, in situations such as physical blight essentially amounting to a nuisance, any power to take such property and transfer it to private parties ought, at a minimum, be closely tied to property that is actually blighted – and hence subject to potential forfeiture as a nuisance – or such narrow category of non-blighted property whose taking is necessary to the primary condemnation of the blighted property itself. *Cf. Allydon Realty* v. *Holyoke*, 23 N.E.2d 665, 668 (Mass. 1939) ("[T]he analogy between a slum and a public nuisance cannot be overlooked . . . . The abatement of a public nuisance may well be a public purpose."). What should be outside the scope of public use is the taking of non-blighted property where the actual blighted property remains uncondemned. The tactic proposed by the respondents below – taking non-blighted property and transferring it to preferred owners in the hope that they will bring benefits to the rest of the City and thereby create inducements for others to actually cure the blighted areas is far too tenuous a chain of reasoning to be shoe-horned into the concept of public use. *Cf. United States* v. *Morrison*, 529 U.S. 598, 615 (2000) (reasoning that follows a "but-for causal chain * * * to every attenuated effect" im-

plicating an enumerated power is "unworkable if we are to maintain the Constitution's enumeration of powers").

Third, even if the concept of public use were somehow to be tied to a somewhat indirect public benefit, allowing such benefit to turn on a "trickle-down" theory that private advantage begets public advantage would completely eliminate all conceivable distinctions between "public" and "private" use. As the Illinois Supreme Court correctly observed in *SWIDA*, "every lawful business" contributes to positive economic growth, and "if property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain." 768 N.E.2d at 9, 10 (internal quotation marks omitted).

The taking condoned by the Nevada Supreme Court below violates all of these principles. Petitioners' property was never intended to be or actually used by the public, it was not taken incidentally to the taking of some other property that would be used by the public, and the only justification given for its taking was the supposed public benefits that came from a preferred private enterprise occupying the land. What makes the taking even more problematic is that it will be paid for entirely by the private recipients of the land, and hence there is not even the political check of public spending to force government officials to carefully weigh the costs and benefits of the proposed taking. Such a disconnect between the persons wielding the power of eminent domain and those paying the costs of its exercise severely undermines any argument for deference to the governmental decisionmakers choosing to take petitioners' property.

Ultimately, the taking of private property paid for by private funds and given over to private casinos is so far from a public use that it demands attention if the Constitution's protection of property is to retain serious meaning.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

Dated: February 6, 2004.

MOTION FILED
FEB 6 - 2004

(4)

No. 03-972

In the

Supreme Court of the United States

CAROL PAPPAS, JOHN H. PAPPAS, JR., and HARRY PAPPAS,
Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, and FREMONT STREET EXPERIENCE PARKING CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

WILLIAM H. MELLOR
DANA BERLINER
SCOTT G. BULLOCK
Institute for Justice
1717 Pennsylvania Ave., NW,
Suite 200
Washington, DC 20006
Telephone: (202) 955-1300
Facsimile: (202) 955-1329

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae
Pacific Legal Foundation and Institute for Justice

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the Institute for Justice respectfully move this Court for leave to file the attached amicus curiae brief in support of Petitioners, Carol Pappas, et al. Consent to the filing of this brief has been granted by counsel for Petitioner, and has been lodged with the Clerk of this Court. Respondents, Las Vegas Downtown Redevelopment Agency, et al., have withheld consent, necessitating the filing of this motion.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Attorneys for Pacific Legal Foundation have represented property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 30 years.

Pacific Legal Foundation has likewise been involved as an amicus in cases dealing with the specific meaning of the Public Use Clause in cases ranging from *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), to the present case when it was before the Nevada Supreme Court. Because of the Foundation's experience in the field of the Takings and Public Use Clauses, it can add a unique perspective that will assist this Court's consideration of this case.

The Institute for Justice is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational

liberty, and the free exchange of ideas. The Institute is committed to the principle that "[i]ndividual freedom finds tangible expression in property rights" and that such rights are imperiled by arbitrary use of the power of eminent domain for the benefit of private interests. *See United States v. James Daniel Good*, 510 U.S. 43, 61 (1993). It litigates property rights cases throughout the country and files amicus curiae briefs in important cases nationwide, including every major United States Supreme Court property rights case of the past ten years. The Institute regularly brings cases on behalf of property owners fighting condemnation of their homes or businesses for the benefit of private parties. It also files amicus curiae briefs in state supreme courts on behalf of owners fighting the government's right to take their property, and it filed a brief in support of the Pappas family in the instant case before the Nevada Supreme Court.

The present case represents a paradigmatic example of what happens when courts are too deferential to legislative determinations of public use. In many communities, blighted neighborhoods often characterized by an excess of "adult" oriented entertainment. Here, an ordinary business establishment belonging to Mrs. Pappas and her family was declared blighted and condemned in order to make way for a parking lot owned by a consortium of casinos that advertises itself euphemistically as the place "where grown ups come to play." http://www.a2zlasvegas.com/fse/fse06.html (Fremont Street Experience press release titled "Downtown Las Vegas Visitor Profile Accentuates Adult Environment") (last visited Feb. 3, 2004).

This amicus brief will urge this Court to grant review in order to resolve the conflict over the appropriate level of review of legislative actions that result in the condemnation of private property for the benefit of private developers. Without meaningful scrutiny of legislative determinations of blight made to justify the condemnation of private property, the "Public Use

Clause" will be little more than precatory fluff. Amici Pacific Legal Foundation and the Institute for Justice believe that they can add insight as to why it is important for this Court to grant the petition and respectfully request that this motion to file a brief amicus curiae be *granted.*

DATED: February, 2003.

Respectfully submitted,

WILLIAM H. MELLOR
DANA BERLINER
SCOTT G. BULLOCK
Institute for Justice
1717 Pennsylvania Ave., NW,
Suite 200
Washington, DC 20006
Telephone: (202) 955-1300
Facsimile: (202) 955-1329

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae
Pacific Legal Foundation and Institute for Justice

QUESTIONS PRESENTED

1. Whether the Supreme Court of Nevada's reading of *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), violates the fundamental constitutional right of private property ownership by permitting local governmental agencies acting in the name of "economic redevelopment" to take property that is neither blighted nor surrounded by blight and give it to other private parties who supposedly can use that property more profitably on the theory that enhanced private profitability indirectly will benefit the public.

2. Whether the conflict among state courts interpreting *Berman* and *Midkiff* in addressing the extent to which local governmental agencies can take property from one private owner and give that property to another private owner in the name of "economic redevelopment" demonstrates the need to revisit and clarify the holdings of those decisions.

3. Whether, if the Nevada Supreme Court's reading of *Berman* and *Midkiff* is accurate, this Court must now revitalize the "public use" limitation placed on the power of eminent domain by the Fifth and Fourteenth Amendments in light of this Court's more recent decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and in light of recent abuses of that power in the name of "economic redevelopment."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY 1

ARGUMENT 2

I. MANY COURTS HAVE APPLIED MORE SEARCHING REVIEWS OF ASSERTIONS OF PUBLIC USE THAN FOLLOWED BY THE COURT BELOW 2

II. OVERLY DEFERENTIAL STANDARDS OF "PUBLIC USE" HAVE LED TO UNCHECKED ABUSES OF THE POWER OF EMINENT DOMAIN 8

III. PUBLIC POLICY FAVORS AND THE CONSTITUTION DEMANDS A MORE SEARCHING STANDARD OF JUDICIAL REVIEW OF CONDEMNATIONS OF PRIVATE PROPERTY WHEN IT IS ALLEGED THAT THE TAKING WILL PRIMARILY BENEFIT PRIVATE PARTIES 11

A. This Court Has Recognized the Importance of Checking Private Takings 11

B. A Growing Chorus of Commentators Have Called for a More Heightened Judicial Scrutiny of Private Takings 12

C. Heightened Judicial Review of the Means Employed to Achieve the Legitimate Ends of Government Programs Will Comport with Recent Advancements in Takings Theory 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot with unpublished opinion at* 60 Fed. Appx. 123 (9th Cir. 2003) 7

Bailey v. Myers, 76 P.3d 898 (Ariz. App. 2003) 10

Berman v. Parker, 348 U.S. 26 (1954) ..... i, 1

Calder v. Bull, 3 U.S. 386 (1798) 11

City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1 (Nev. 2003) 3

Citizens' Savings & Loan Ass'n v. City of Topeka, 87 U.S. 655 (1874) 12

Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... i, 16

Georgia Dept. of Transp. v. Jasper County, 586 S.E.2d 853 (S.C. 2003) 6-7

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) ..... i, 1-3

In re Condemnation of 110 Washington St., 767 A.2d 1154 (Pa. Commw. Ct.), *appeal denied*, 788 A.2d 379 (Pa. 2001) 5

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1905) 12

Merrill v. City of Manchester, 499 A.2d 216 (N.H. 1985) 4

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 8

TABLE OF AUTHORITIES—Continued

Page

Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178 (Conn. 2002) 5

Road League Review v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967) 45

Southwestern Illinois Development Authority v. National City Environmental L.L.C., 768 N.E.2d 1 (2002) ... 5-6

Sweetwater Valley Civic Association v. National City, 555 P.2d 1099 (Cal. 1976) 7

Wilkinson v. Leland, 27 U.S. 627 (1829) 11-12

Rule

Supreme Court Rule No. 37.6 1

Miscellaneous

Berliner, Dana, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (2003), *available at* http://www.castlecoalition.org/report/report.shtml .. 9-10

Brine, Russell A., Note: *Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry*, 71 Cornell L. Rev. 428 (1986) 15

Cooley, Thomas, *A Treatise on Constitutional Limitations on the Police Power of the States* (1868) 12

Cruse, Linda, *Merriam Sells Condemned Property to Baron BMW*, Kansas City Star, Jan. 27, 1999 (1999 WL 2402262) 10

Garnett, Nicole Stelle, *The Public-Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003) 17-18

TABLE OF AUTHORITIES—Continued

Page

Jones, Steven J., Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285 (2000) 15

Kochan, Donald J., *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49 (1998) .. 13-14, 16

Kulick, Peter J., Comment: *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" —A Proposal to Redefine "Public Use,"* 2000 L. Rev. Mich. State U.-Det. C. L. 639 (2000) 14-15

Landry, Mark C., Note: *The Public Use Requirement in Eminent Domain—A Requiem*, 60 Tul. L. Rev. 419 (1985) 15

McIntire, Michael V., *"Necessity" in Condemnation Cases—Who Speaks for the People?*, 22 Hastings L.J. 561 (1971) 4

Merrill, Thomas W., *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986) 3-4, 14

Michaelman, Frank I., *Property as a Constitutional Right*, 38 Wash & Lee L. Rev. 1097 (1981) 17

Sandefur, Timothy, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 S.U. L. Rev. 569 (2003) 18

Staley, Sam, *Wrecking Property Rights*, Reason, Feb. 2003 (2003 WL 5748895) 10

INTEREST OF AMICI CURIAE

The interest of Amici is described in the motion to file this brief.[1]

INTRODUCTION AND SUMMARY

When a government announces an intention to condemn private property for a public use, the private owners are necessarily concerned. Even with the guarantee of just compensation, many landowners experience a sense of violation and will often suffer demoralization costs that cannot be redressed with the payment of cash. Nevertheless, most landowners will, in time, accept the importance of government's ability to condemn private property for the greater public good when legitimate public projects are at stake. However, when private property is condemned to make way for what appears for all practical purposes to be a private use, the sense of injury experienced by landowners may be beyond repair.

In past years this Court has recognized that public projects that require the exercise of the power of eminent domain may involve more than those projects that are actually used and occupied by the public or government installations. Beginning in cases like *Berman v. Parker*, 348 U.S. 26 (1954), this Court has counseled for a broader than literal reading of the words "public use." But with this relaxed standard for reviewing public use determinations, there has come a growing sense of unfairness as landowners are evicted from their properties to make way for private commercial development that sometimes appears to be more a result of political connectedness than of any actual public use or purpose. Courts and the commentators

---

[1] Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

have reacted to this growing sense of unease with a variety of actual and proposed review standards that defy easy categorization. It has now come to the point that what condemnors can accomplish with impunity in one jurisdiction they cannot in another. Some lower state courts see their role as one that must affirm any scheme where the condemning agency chants the magical words "public purpose." Other courts believe a more searching standard of review is in order, a view with which many legal scholars agree.

It is time, therefore, for this Court again to step into the breach and provide guidance as to the appropriate standard of review when a governmental entity seeks to condemn private property to facilitate a largely private venture.

This brief amicus curiae will demonstrate first that the standard employed by the Nevada Supreme Court is inconsistent with that of many other courts. Second, Amici will show that the employment of lax standards of review of questions of public use has led to rampant abuse in many states. Third, the public policy considerations that favor a more searching review of takings of private property that largely benefit private interests will be addressed—starting with early and emphatic statements of this Court and ending with citation of the many recent scholars who are calling for greater judicial review of private takings.

ARGUMENT

I

MANY COURTS HAVE APPLIED MORE SEARCHING REVIEWS OF ASSERTIONS OF PUBLIC USE THAN FOLLOWED BY THE COURT BELOW

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 245, this Court correctly noted that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it

would serve no legitimate purpose of government and would thus be void." But this Court also held that in reviewing an exercise of the condemnation power where it is alleged that no public use is involved, "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.'" *Id.* at 240 (citation omitted). Moreover, this Court held, a court must "not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* at 241 (citation omitted). Unfortunately, some courts, such as the Nevada court below, have interpreted this standard of review to call for an overly limited view of the courts' role to review suspect exercises of the power to condemn private property. *See, e.g.*, Opinion in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 10-11 (Nev. 2003), reproduced in Petitioners' Appendix at 14a-15a.

A number of courts have been confronted with condemnations of private property where there was a strong possibility that what was involved was little more than a "purely private taking" dressed up with a bit of "public purpose" lipstick. In these circumstances, courts have struggled with finding a means to provide some sort of meaningful review of the taking, regardless of the view of some courts that the standards of review should be overly deferential.

As Professor Merrill has noted, many courts have shown themselves "much less deferential to legislative declarations of public use than one would expect" from inaccurate suggestions that *Midkiff* and similar cases stand for the proposition that the state of the law is for courts to eschew meaningful judicial review in this area. Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 65 (1986). Professor Merrill surveyed all indexed federal and state appellate opinions, from 1954 through 1985, that touched on public use questions; he found a significant number holding that a taking does not serve a public use, and that the percentage of such decisions generally

increased over the 31-year period. *Id.* at 65, 97. Of the 308 opinions in the sample, "the relatively high number" of 47—15.3%—held that the proposed taking did not serve a public use. Among state court rulings, roughly one in six—16.2%—reached that conclusion. *Id.* at 96. In other words, there are a minority of states that have found it necessary to engage in a more searching review.

A typical rationale was offered by the New Hampshire Supreme court in *Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1985). The city had sought to condemn a family woodlot for use as an industrial park. Relying on an analogous Public Use Clause in the New Hampshire Constitution, the court weighed the public benefit against the social costs of losing the property's use as intended by its longtime owners. Because "the social costs exceed the probable benefits, . . . the project cannot be said to be built for a public use." *Id.* at 217. This elegant formula offers a valuable example for analyzing the present case, in which an ongoing private business—an entity providing social benefit—was deprived of its valuable private property.

As early as 1971, a commentator already found courts in a number of states insisting on an active, rather than passive, approach to deferential review of condemnations, "conforming to the principle that '[t]o hold that these decisions cannot be reviewed, no matter how arbitrary they may be, would be unsound and unjust.'" Michael V. McIntire, *"Necessity" in Condemnation Cases—Who Speaks for the People?*, 22 Hastings L.J. 561, 567 (1971) (quoting *Road Review League v. Boyd*, 270 F. Supp. 650, 660 (S.D.N.Y. 1967)).

If Professor Merrill could write—18 years ago, in the wake of *Midkiff*—that "judicial enforcement of the public use requirement is not a thing of the past . . . [but rather], is generally on the rise," Merrill, *supra*, at 97 n.6, the observation can be made with equal force today.

Significant recent rulings have affirmed that court review of eminent domain condemnations should not amount to rubber stamping. For instance, the Connecticut Supreme Court barred the City of Bridgeport from using eminent domain to take the venerable Pequonnock Yacht Club in order to market the land to private developers. The court held that it was unreasonable for the government to take the yacht club without considering if the club could be integrated into the plan. *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002). "'Just because the property may be desirable to the defendants does not justify its taking by eminent domain.'" *Id.* (quoting trial court's memorandum). The Fifth Amendment should provide no less protection than this.

In *In re Condemnation of 110 Washington St.*, 767 A.2d 1154 (Pa. Commw. Ct.), *appeal denied*, 788 A.2d 379 (Pa. 2001), the Pennsylvania Commonwealth Court struck down a condemnation that was for all intents and purposes stage-managed by a private developer that had entered into a contract with the redevelopment agency. The court pointed out that eminent domain power, an aspect of sovereignty, cannot be delegated—without legislative authorization—to a private party, nor can it be put to an essentially private use. Relying in part on precedents of this Court, the Pennsylvania court found that such a private taking would violate the state constitution's Public Use Clause. Again, these principles should apply equally when evaluating the protections of the federal Constitution for private landowners.

In a landmark ruling relying on both the Fifth Amendment to the United States Constitution and the Illinois Constitution, the Illinois Supreme Court stopped an attempt by a development authority to take private property to provide land for a parking lot for a thriving adjacent racetrack. *Southwestern Illinois Development Authority v. National City Environmental L.L.C.*, 768 N.E.2d 1 (Ill. 2002). Notably, the court observed that

> revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government. Using the power of the government for purely private purposes to allow [the race track] to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public.

Id. at 10-11. In other words just because some public good might flow from the project, whether it be a racetrack parking lot or a downtown Las Vegas adult-oriented casino parking lot, cogent reasons must be available to explain why the racetrack (or the casino) should not be required to utilize the open real estate market.

The decision in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot with unpublished opinion at* 60 Fed. Appx. 123 (9th Cir. 2003), likewise goes to the heart of the public use question. In that case, the City of Lancaster sought to condemn a discount store to enable the expansion of a neighboring Costco store. The district court rejected the Lancaster redevelopment agency's claims of public use as pretextual, because the evidence showed that the purpose of the condemnation of the property being leased by plaintiff was to accommodate the demands of another, competing retailer, and that there was no present blight to be remedied. *Id.* at 1130-31.

Most recently, the South Carolina Supreme Court struck down, on state constitutional grounds, a purported public use take (of property belonging to the State of Georgia within the State of South Carolina), noting first that "[w]e take a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess, and defend property." *Georgia Dept. of Transp. v. Jasper County*, 586

S.E.2d 853, 856 (S.C. 2003). The court found "[t]he involuntary taking of an individual's property by the government is not justified unless the property is taken for public use—a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property." *Id.* at 857.

At least from the period chronicled by Professor Merrill right up to today, there has been a continuous, significant stream of judicial opinions which—even while exercising deference—have found condemnation actions failing the public use test. These courts have recognized that their deference must be shaped and qualified by their obligations to the Fifth Amendment and to the principle that,

> [o]ne man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well designed .... [Eminent domain] never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan.

Sweetwater Valley Civic Association v. National City, 555 P.2d 1099, 1103 (Cal. 1976).

On the other side of the ledger are cases like the one below, where courts have been overly deferential to legislative findings of public use. If too literal an adherence is paid to *Midkiff*'s language of "impossibility" or "palpably without reasonable foundation" then courts, such as the Nevada Supreme Court, will issue rulings in conflict with the more sensible views of the judicial role of "public use" review described above. And, without such review, the abuses described in the next section will continue.

II

OVERLY DEFERENTIAL STANDARDS OF "PUBLIC USE" HAVE LED TO UNCHECKED ABUSES OF THE POWER OF EMINENT DOMAIN

The justification for many of the private takings such as that of the Pappas' property is that by subsidizing one private business (even at the expense of another) the economy of the neighborhood improves, thereby benefitting the entire community. This "rising tide raises all boats" sort of mentality may or may not be good public policy, but if done without adequate attention to constitutional requirements we will be "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

In other words, if any general benefit to the public can satisfy the public use limitation—even when such benefits are incidental to a private company's profit and success—then the public use limitation would be nullified, because every successful business provides some sort of benefit to the public.

To equate public use with public benefit enables a party to use eminent domain whenever it can convince public authorities that its business enhances the community in some way. Unfortunately, this means that the power to condemn private property will fall into the hands of the most politically influential parties. When meaningfully enforced, however, the public use requirement prevents politically powerful groups from using the state's eminent domain power for their own purposes, and enriching themselves by taking away the property of the less politically successful. Without meaningful review, as is often the case today, abuses become rampant.

In the past 5 years alone, at least 3 condemnation proceedings have been filed in Nevada to benefit private developers, rather than a public use. Dana Berliner, *Public*

Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain 129 (2003), *available at* http://www.castlecoalition.org/report/report.shtml. Another 15 have been threatened. *Id.* Other notable states include California (223 and 635 actual and threatened, respectively), Florida (67 and 2,225), Michigan (138 and 173), Maryland (127 and 1,110), Michigan (138 and 173), Ohio (90 and 331), and Pennsylvania (2517 and 108). *Id.* at 20, 52, 100, 159, and 173. Nationwide, over 3,700 properties have been condemned for the benefit of private parties since 1998 while another 6,650 properties have been threatened with condemnation for private uses. *Id.* at 2. In fact, this estimate may be far too conservative, since many condemnations are not challenged by landowners who often have few resources available to oppose a condemnation. Berliner's study recounts, for example, instances where local governments have:

- Evicted four elderly siblings in Bristol, Connecticut, from their home of the last 60 years for an industrial park;
- Destroyed a black middle-class neighborhood in Atlantic City . . . in order to build a tunnel to a new casino . . .;
- Removed a woman in her 80s from her home of 55 years for the claimed purpose of expanding a sewer plant, but Bremerton, Washington actually gave her former home to an auto dealership;
- Condemned 10 homes for a shopping center and parking lot in Hurst, Texas and forced them to move while the spouses in two of the homes were dying of cancer;

- Condemned a family's home in Florida so that the manager of a planned new golf course could live in it.

Id. at 3.

Most eminent domain abuse occurs at the local level; for example, the City of Mesa, Arizona, recently tried to condemn a small automobile shop called Bailey's Brake Service in order to transfer it to a private party to construct a hardware store. *See* Sam Staley, *Wrecking Property Rights*, Reason, Feb. 2003, at 32 (2003 WL 5748895).[2] And the City of Merriam, Kansas, recently condemned a Toyota dealership, in order to sell the land to the BMW dealership next door. Linda Cruse, *Merriam Sells Condemned Property to Baron BMW*, Kansas City Star, Jan. 27, 1999, at 4 (1999 WL 2402262).

Only by restoring a meaningful degree of judicial review to these private takings can landowners be protected in a manner contemplated by the United States Constitution.

---

[2] To be sure, the Arizona Appellate Court recently struck down this particular condemnation, but only after expressly noting that it was basing its decision on the Arizona State Constitution, a document that provides considerably more protection to landowners, and therefore less opportunity for abuse, than the federal Constitution. *Bailey v. Myers*, 76 P.3d 898, 903 (Ariz. App. 2003). In rejecting this pretextual taking of a private brake shop for a private hardware store, the Arizona court rejected application of the standards often attributed to *Hawaii Housing Authority*, noting that "[t]he federal constitution provides considerably less protection against eminent domain than the state Constitution provides." *Id.* Perhaps the degree of protection provided in Arizona is, in truth, more in keeping what federal standards *ought* to provide and a good reason for this Court to grant the petition.

III

PUBLIC POLICY FAVORS AND THE CONSTITUTION DEMANDS A MORE SEARCHING STANDARD OF JUDICIAL REVIEW OF CONDEMNATIONS OF PRIVATE PROPERTY WHEN IT IS ALLEGED THAT THE TAKING WILL PRIMARILY BENEFIT PRIVATE PARTIES

A. This Court Has Recognized the Importance of Checking Private Takings

Beginning with *Calder v. Bull*, 3 U.S. 386 (1798), this Court has recognized the importance of the role of courts to be a check on private takings. For example, in *Calder*, Justice Chase denounced unjust laws, singling out for criticism

> a law that takes property from A. and gives it to B: It is against all reason and justice . . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.

Id. at 388-89.

Likewise, Justice Story wrote for the Court in *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829), "[t]hat government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint." Justice Story continued:

> We know of no case in which a legislative act to transfer the property of A, to B, without his consent has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been consistently resisted as inconsistent with just principles, by every judicial

> tribunal in which it has been attempted to be enforced.

Id. at 658.

Later, in *Citizens' Savings & Loan Ass'n v. City of Topeka*, 87 U.S. 655, 663 (1874), the Court declared that a statute providing that "the homestead now owned by A should no longer be his, but should henceforth be the property of B" would be invalid because of the "limitations on [government] power which grow out of the essential nature of all free governments." Accord *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-52 (1905).

As Thomas Cooley wrote during this era: "It may be for the public benefit" to do a variety of things, "but the common law has never sanctioned an appropriation of property based upon these considerations alone; and any such appropriation must be held to be forbidden by our constitutions." Thomas Cooley, *A Treatise on Constitutional Limitations on the Police Power of the States* 532-33 (1868). In short, "public use implies a possession, occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property, if the right of the government to seize and appropriate it could exist for any other use." *Id.* at 531. As noted previously, the 20th Century saw the rise of a more relaxed view of public use and the role of judicial review. Some courts, such as the one below, have taken this relaxation too far. As seen next, many scholars are calling for reform.

B. A Growing Chorus of Commentators Have Called for a More Heightened Judicial Scrutiny of Private Takings

Government must have the ability to condemn private property when it is necessary to achieve important public objectives. But, if the ability to condemn private property is unchecked, then the rent seeking tendencies of special interests will inevitably abuse private property interests.

Recognizing that private takings are forbidden, the real question is: How can a court determine whether a taking is indeed a private taking rather than a taking for a public use or purpose pursuant to a project that will be facilitated by private parties? In many instances, there can be little question that a public use is involved, despite the fact that private parties will stand to receive benefits from a condemnation. Thus, when government condemns private property for a public road, there is no question that public use is involved, despite the fact that a multitude of private contractors may be involved in the construction. Because it is obvious that the sine qua non of public use is met—the public is actually using the facilities—there is little need of an exacting judicial scrutiny of the question of public use.

But, when the condemnation is not for a public facility, and is instead for a private enterprise, the question of public use is less easy to discern. Certainly, tearing down slums and replacing them with buildings that do not breed crime and blight may be in the public interest. And replacing crack houses with retail and office space may be in the public interest. But when is the public interest subsumed by a greater private interest—the interest of a developer in acquiring properties with minimal transactional costs for private gain? How can a court recognize such circumstances without some greater level of scrutiny than mere rational basis?

Because of the threat of rent-seeking abuse of the power of eminent domain, a growing chorus of commentators has called for the utilization of stricter scrutiny when some of the indicia of a "private taking" are present, namely the existence of a private redeveloper who is benefitting from a redevelopment condemnation in order to construct a private enterprise. Professor Kochan has written: "Given the importance of private property rights, it is critical to determine whether any rule, constitutional or otherwise, might be able to adequately protect those rights against expropriation by

legislative actors at the behest of special interests." Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 59 (1998). He laments the trend in some courts to employ a relaxed standard of review in these circumstances:

> [C]ourts have no theory or conceptual foundation from which meaningful standards for judicial review of public use issues might originate. Instead, the cases are filled with cliches regarding the "breadth" and "elasticity" of the "evolving" concept of public use, language indicating a dearth of theory—or perhaps a lack of any desire to develop one.

Id. at 76.

While Kochan is skeptical and thinks that the courts lack the resolve to more forcefully police the concept of "public use," other commentators believe that an effective resolution may be found if courts employ a more searching standard of review. In redevelopment cases, especially those where private entities stand to reap substantial profits from the condemnation of private property, Professor Merrill cautions for a more searching judicial review: "In cases where eminent domain is most likely to foster secondary rent-seeking behavior—where one or a small number of persons will capture a taking's surplus—courts should closely scrutinize a decision to confer the power of eminent domain." *See* Merrill, *supra*, at 87.

Likewise, Peter J. Kulick concludes:

> The purpose of imposing strict scrutiny review on public-private takings is to ensure that, assuming the development can meet the other factors, the project is vital and can be accomplished by no other means; that the land for the project cannot be acquired through the private market.

Peter J. Kulick, Comment: *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" —A Proposal to Redefine "Public Use,"* 2000 L. Rev. Mich. State U.-Det. C. L. 639, 681 (2000), text after note 250.

> Steven Jones argues for strict scrutiny, noting that
>
> > [u]nder strict scrutiny analysis, the condemning authority must demonstrate a compelling public need. More specifically, the transfer of land from one private individual to another should only occur in exigent socioeconomic circumstances. In addition, the means chosen must be necessary to achieve the compelling objective. In other words, the state must show that benefiting third party exhausted every avenue of purchase on the open market.

Steven J. Jones, Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 311-12 (2000).

Russell A. Brine notes that in Supreme Court jurisprudence

> [t]he Court has been less deferential, however, to private transferee takings because they are more likely to further private use ends. Consequently, in private transferee cases the Court has required a more substantial degree of benefit and a stronger relationship between the taking and the public benefit or purpose.

Russell A. Brine, Note: *Containing the Effect of* Hawaii Housing Authority v. Midkiff *on Takings for Private Industry*, 71 Cornell L. Rev. 428, 432 (1986). *See also* Mark C. Landry, Note: *The Public Use Requirement in Eminent Domain—A Requiem*, 60 Tul. L. Rev. 419 (1985) (argues that drafters of

federal Constitution would not countenance condemnation for private gain).

It is the duty of courts to ensure that actions undertaken by state and local government conform to the restraints imposed by the state and federal Constitutions. Those Constitutions were designed neither to handcuff government when it pursues legitimate goals nor to countenance the abrogation of individual rights when to do so might facilitate the greater public good. Indeed, it is doubtful that a government action can truly advance the greater public good if it involves the destruction of individual rights: the cost for the public good taints and outweighs any public benefit. *See, e.g.*, Kochan, *supra*, at 87-88 ("In governmental condemnations for private use, the disruption in the sanctity of private property and the reductions in investment and productivity as a result of 'unsafe' title may outweigh the benefits obtained from the property's alternative use prompted by the transfer."). Because the role of government is to protect individual rights and liberties and to promote the general welfare, and because the role of the courts is to ensure that the government is hewing to the proper balance between the preservation of liberties and their destruction, then it is critical that courts recognize the balance and act to ensure that government does not overstep its authority while it advances the public interest.

C. Heightened Judicial Review of the Means Employed to Achieve the Legitimate Ends of Government Programs Will Comport with Recent Advancements in Takings Theory

The third question presented by Petitioners suggests that the standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), calls for a "revitalization" of the "public use" limitation of the power to condemn. Interestingly, this is precisely what a recent commentator has called for when she recognizes that in *Dolan* this Court did not call for heightened scrutiny of the legitimate *ends* of government action, but rather the *means* used to achieve

those ends. *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003).

Professor Garnett notes two deficiencies with the current state of the law. First, despite the assurance of "just compensation," landowners are often not made whole because of intrinsic "demoralization costs." *Id.* at 938 (citing Frank I. Michaelman, *Property as a Constitutional Right*, 38 Wash & Lee L. Rev. 1097 (1981)).

Second, Garnett explains, "public-choice theory suggests that the compensation requirement alone will not necessarily deter the government from overacquiring private property." Garnett, *supra*, at 938. Comparing the government impetus to acquire property through condemnation, as opposed to the sort of exactions imposed in *Dolan*, she continues, "On the contrary, the need for a government to 'compete' for development might constrain the use of exactions but not the power of eminent domain." 71 Geo. Wash. L. Rev. at 938.

Building on the work of Professor Merrill, Professor Garnett suggests that increased scrutiny in eminent domain cases need not mean increased review of the legislative *ends* of redevelopment projects. Rather, more careful scrutiny of the *means*—here the condemnation of private property for the benefit of private developers—requires a more searching standard of judicial review.

By shifting to the means type of analysis employed by *Dolan*, Garnett believes the courts will be able to put a check on the instances where government employs takings of private property for the primary benefit of private developers without the province of the Legislature. One suggested mechanism for such a *Dolan* analog would be for the courts to ask whether

> the government [can] demonstrate that a given exercise of eminent domain was "reasonably necessary" to advance or "related in nature or extent"

> to the public purpose for which the condemnation power was invoked? This inquiry would continue to reflect the view that legislators, rather than judges, should determine what projects are in the public interest.

Id. at 964. While this inquiry may reflect a different approach than the courts often see coming from *Midkiff*, it is a workable approach that will serve to end some of the more flagrant abuses of the power of eminent domain.

To be sure, however, not everyone agrees with the idea that employing a stricter means based analysis will solve the problems. As Timothy Sandefur suggests:

> An approach whereby courts review means but not ends only results in more efficient ways of depriving people of their rights. . . . [L]andowners will not be safe from expropriation by . . . politically powerful parties until society solves the problem the Progressives left unsolved: delineating the boundary between public and private.

Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 S.U. L. Rev. 569, 671 (2003). Sanderfur may well be right; so long as too much deference is paid to those legislative choices which are driven by rent-seekers, no amount of scrutiny of the means to those ends will protect the rights of ordinary and relatively powerless citizens. The petition stage is not the time or place to resolve this debate; this is, however, the time and place for this Court to accept review in order to delve into the debate and for it to put a check on the abuses of eminent domain represented by cases such as the present one.

The third question presented by Petitioners raised the example of the *Dolan* analysis as a way this Court can restore

vitality to the Public Use Clause. Whether the best way to do that is through Professor Garnett's methodology, or the approach of those calling for greater scrutiny of government ends whenever any individual rights are at stake, it is clear that this Court needs to grant review to help guide the courts, government agencies, and individual landowners.

CONCLUSION

The time has come for this Court to rein in the growing abuse by some government agencies of the power of eminent domain. While some courts employ meaningful standards of review, others do not. There is presently plenty of intellectual ammunition for this Court to consider when it takes up the question of the appropriate role for judicial review of the condemnation of private property for largely private uses. The Petition for Writ of Certiorari should be GRANTED.

DATED: February, 2004.

Respectfully submitted,

WILLIAM H. MELLOR
DANA BERLINER
SCOTT G. BULLOCK
Institute for Justice
1717 Pennsylvania Ave., NW,
Suite 200
Washington, DC 20006
Telephone: (202) 955-1300
Facsimile: (202) 955-1329

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae
Pacific Legal Foundation and Institute for Justice

MOTION FILED
FEB 6 - 2004

(5)

No. 03-972

In The
Supreme Court of the United States

CAROL PAPPAS, JOHN H. PAPPAS, JR., and HARRY J. PAPPAS,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, and FREMONT STREET EXPERIENCE PARKING CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

MOTION FOR LEAVE TO FILE AND BRIEF OF ARIZONA PROPERTY OWNERS SAIED AFKARY, MARK LAMBARD, KENNETH B. PILLOW AND MARY ANN PILLOW AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ILYA SOMIN
GEORGE MASON UNIV.
SCHOOL OF LAW
3301 N. Fairfax Drive
Arlington, VA 22201
(703) 993-8069

VIET D. DINH
(*Counsel of Record*)
BANCROFT ASSOCIATES, PLLC
2121 Bancroft Place, N.W.
Washington, D.C. 20008
(202) 662-9324

February 6, 2004

Counsel for Amici

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE AND BRIEF OF ARIZONA PROPERTY OWNERS SAIED AFKARY, MARK LAMBARD, KENNETH B. PILLOW AND MARY ANN PILLOW AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, Arizona property owners Saied Afkary, Mark Lambard, Kenneth B. Pillow, and Mary Ann Pillow respectfully move for leave to file the attached brief as amici curiae in support of the Petitioner.

The Petitioners have consented to the filing of this brief. However, respondents have not responded to requests for consent. Amici file this motion, as required by Rule 37.2(b), because parties to the case have presumably withheld consent, in order to call the Court's attention to legal developments and matters not already brought to its attention by the parties.

INTERESTS OF AMICI CURIAE

Amici Saied Afkary, Mark Lambard, Kenneth B. Pillow, and Mary Ann Pillow are property owners in Tempe, Arizona, who resisted efforts by a private developer to acquire land to construct a seven- to ten-acre shopping center. The developer acquired all other necessary properties, but amici refused to sell their land. The City of Tempe thereafter initiated eminent domain proceedings against amici. Amici contested the eminent domain, alleging abuse of the taking power to advance private interests. Discovery in those proceedings indicated that the City had entered into a contract to transfer

amici's land to the private developer at apparently below-market values in return for a percentage of the profits from the private shopping center.

While the proceedings were pending, *Bailey* v. *Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) held that "when a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is 'really public.'" Thereafter, the City agreed to a stipulated dismissal of the eminent domain proceedings against amici. The trial court's award of costs and attorneys fees to amici relating to those proceedings is pending appeal.

Amici Kenneth B. Pillow and Mary Ann Pillow have testified before the Arizona legislature about their experience with abuse of the eminent domain power. Amici continue to engage in advocacy activities to encourage proper application of the Fifth Amendment to limit taking of property only for public use and not to advance private interests. All amici believe that the issue presented to the Court by the petition for writ of certiorari is one of national importance that should be resolved by the Court.

For the foregoing reasons, amici curiae respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

ILYA SOMIN
GEORGE MASON UNIV.
SCHOOL OF LAW
3301 N. Fairfax Drive
Arlington, VA 22201
(703) 993-8069

VIET D. DINH
(*Counsel of Record*)
BANCROFT ASSOCIATES, PLLC
2121 Bancroft Place, N.W.
Washington, D.C. 20008
(202) 662-9324

Counsel for Amici

February 6, 2004

QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment, which permits condemnation of property only for a "public use," impose any limit on governmental power to take property to advance private interests?

2. Does *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229 (1984) require deference to the government's post hoc assertion of public use as a pretext for expropriation of property for the benefit of private interests?

3. Does *Berman* v. *Parker*, 348 U.S. 26 (1954), which authorizes condemnation to alleviate blight in slum-like areas, license expropriation of property when neither the property nor its surrounding area is actually blighted?

4. Is an effectively unlimited power to condemn private property for private interests consistent with this Court's determination to protect property rights on an equal basis with other constitutional rights?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	2
I. The decision below misinterprets *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229 (1984), to permit virtually unlimited government power to condemn property for private uses and conflicts with decisions by the Seventh and Ninth Circuits	5
A. The decision below would allow the taking of virtually any property	6
B. The judgment below conflicts with decisions by the Seventh and Ninth Circuits	9
II. The decision below misinterprets *Berman* v. *Parker*, 348 U.S. 26 (1954), to allow condemnation to alleviate "blight" even absent slum-like conditions, and thus conflicts with the Supreme Judicial Court of Massachusetts	15
III. The decision below is incompatible with this Court's Case law granting protection to constitutional property rights fully equal to that accorded other constitutional rights	18
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

99 Cents Only Stores v. *Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) 7, 14

Aaron v. *Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *rev'd on other grounds*, 2004 WL 190439 (8th Cir. Feb. 3, 2004) 7, 14

Armendariz v. *Penman*, 75 F.3d 1311 (9th Cir. 1996) ..... *passim*

Avalonbay Cmtys., Inc. v. *Town of Orange*, 775 A.2d 284 (Conn. 2001) 13

Bailey v. *Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003) 1

Baycol, Inc. v. *Downtown Development Auth.*, 315 So.2d 451 (Fla. 1975) 8

Berman v. *Parker*, 348 U.S. 26 (1954) 3, 15, 16, 17, 18

Casino Reinvestment Dev. Auth. v. *Banin*, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998) 13

Chicago, Burlington & Quincy R.R. Co. v. *Chicago*, 166 U.S. 226 (1897) 5, 19

City of Cincinatti v. *Vester*, 281 U.S. 439 (1930) 5, 20

City of Little Rock v. *Raines*, 411 S.W.2d 486 (Ark. 1967) 8

City of Miami v. *Wolfe*, 150 So.2d 489 (Fla. App. 1963) 13

Cottonwood Christian Ctr. v. *Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) 14

County of Wayne v. *Hathcock*, 671 N.W.2d 40 (Mich. 2003) 8

TABLE OF AUTHORITIES – Continued

Page

County of Wayne v. *Hathcock*, 2003 WL 1950233 (Mich. Ct. App. Apr. 24, 2003) 8

Daniels v. *Area Plan Comm'n*, 306 F.3d 445 (7th Cir. 2002) ..... *passim*

Denver W. Metro. Dist. v. *Geudner*, 786 P.2d 434 (Colo. App. 1989) 13

Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 5

Earth Mgmt., Inc. v. *Heard County*, 283 S.E.2d 455 (Ga. 1981) 13

Essex Fells v. *Kessler Inst.*, 673 A.2d 856 (N.J. Super. Ct. Law Div. 1995) 13

Ga. Dep't of Transp. v. *Jasper County*, 586 S.E.2d 853 (S.C. 2003) 8

Greater New Orleans Broad. Ass'n v. *United States*, 527 U.S. 173 (1999) 17

Hawii Hous. Auth. v. *Midkiff*, 467 U.S. 229 (1984) .. *passim*

Hogue v. *Port of Seattle*, 341 P.2d 171 (Wash. 1959) 8, 17

In re Petition of Seattle, 638 P.2d 549 (Wash. 1981) 8

Karesh v. *City of Charleston*, 247 S.E.2d 342 (S.C. 1978) 8

Lynch v. *Household Fin. Corp.*, 405 U.S. 538 (1972) 4, 18, 20

Madisonville Traction Corp. v. *St. Bernard Mining Corp.*, 196 U.S. 239 (1905) 5

Merrill v. *City of Manchester*, 499 A.2d 216 (N.H. 1985) 8

Opinion of the Justices, 126 N.E.2d 795 (Mass. 1995) 3, 4, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Opinion of the Justices, 131 A.2d 904 (Me. 1957) 8

Owensboro v. *McCormick*, 581 S.W.2d 3 (Ky. 1979) 8

Pheasant Ridge Ass'n v. *Town of Burlington*, 506 N.E.2d 1152 (Mass. 1987) 13

Poletown Neighborhood Council v. *City of Detroit*, 304 N.W.2d 455 (Mich. 1981) 8

Prestonia Area Neighborhood Ass'n v. *Abramson*, 797 S.W.2d 708 (Ky. 1990) 9

Redev. Auth. v. *Owners*, 274 A.2d 244 (Pa. Cmmw. Ct. 1971) 13

S.W. Ill. Dev. Auth. v. *Nat'l City Env.*, 768 N.E.2d 1 (Ill. 2002) 7, 12

Stone v. *Powell*, 428 U.S. 465 (1976) 20

Thompson v. *Consolidated Gas Corp.*, 300 U.S. 55 (1937) 3, 5

United States v. *Lopez*, 514 U.S. 549 (1995) 4

Wilmington Parking Auth. v. *Land with Improvements*, 521 A.2d 227 (Del. 1986) 13

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. amend. V 2, 7, 18

U.S. CONST. amend. XIV § 1 5

STATE STATUTES

NEV. REV. STAT. § 279.586(1) (2003) 11

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972) 19

JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992) 18, 19

RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) 19

GEORGE L. KELLING & CATHERINE L. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996) 17

RICHARD PIPES, PROPERTY AND FREEDOM (1999) 18

Ilya Somin, *Michigan Should Alter Property Grab Rules*, Det. News, Jan 8, 2004, § A, at 11 8

INTEREST OF AMICI CURIAE[1]

Amici Saied Afkary, Mark Lambard, Kenneth B. Pillow, and Mary Ann Pillow are property owners in Tempe, Arizona, who resisted efforts by a private developer to acquire land to construct a seven- to ten-acre shopping center. The developer acquired all other necessary properties, but amici refused to sell their land. The City of Tempe thereafter initiated eminent domain proceedings against amici. Amici contested the exercise of eminent domain, alleging abuse of the taking power to advance private interests. Discovery in those proceedings indicated that the City had entered into a contract to transfer amici's land to the private developer at apparently below-market values in return for a percentage of the profits from the private shopping center.

While the proceedings were pending, *Bailey* v. *Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) held that "when a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is 'really public.'" Thereafter, the City agreed to a stipulated dismissal of the eminent domain proceedings against amici. The trial court's award of costs and attorneys fees to amici relating to those proceedings is pending appeal.

---

[1] Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Amici Kenneth B. Pillow and Mary Ann Pillow have testified before the Arizona legislature about their experience with abuse of the eminent domain power. Amici continue to engage in advocacy activities to encourage proper application of the Fifth Amendment to limit taking of property only for public use and not to advance private interests. All amici believe that the issue presented to the Court by the petition for writ of certiorari is one of national importance that should be resolved by the Court.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented in the Petition. For the Court's convenience, amicus notes here only the salient fact that the City of Las Vegas Downtown Redevelopment Agency, in taking Petitioners' property, was acting to advance the interests of the Fremont Street Experience Limited Liability Company ("LLC"), a private consortium of casinos. The trial court found that the Redevelopment Agency had "turned over all control" of the eminent domain process to the LLC. Pet. App. at 101a. Petitioners presented evidence that "the Agency was acting as a front for the LLC." *Id.* at 95a.

REASONS FOR GRANTING THE PETITION

The Nevada Supreme Court misinterpreted *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229 (1984), to permit virtually limitless government power to condemn private property and transfer it to other private parties. The decision below permits government condemnation of property where there are "downward trends in the business community, relocation of existing businesses outside of the community, business failures, and loss of sales or visitor volumes." Pet. App. at 20a. This standard guts the public use requirement of the Fifth Amendment of any meaning because all areas experience periodic "downward trends in

the business community" and occasional "loss of sales or visitor volumes." Rather than reading the Public Use Clause out of the Constitution, *Midkiff* reiterated the principle that " 'one person's property may not be taken for the benefit of another private person without a justifying public purpose.' " *Midkiff*, 467 U.S. at 241 (quoting *Thompson* v. *Consol. Gas Corp.*, 300 U.S. 55, 80 (1937)).

The opinion below conflicts with decisions by the Seventh and Ninth Circuits interpreting the Public Use Clause to impose meaningful limits on the government's power to take private property. *See Daniels* v. *Area Plan Comm'n*, 306 F.3d 445, 462 (7th Cir. 2002) (striking down condemnation for lack of a public use); *Armendariz* v. *Penman*, 75 F.3d 1311, 1321-22 (9th Cir. 1996) (en banc) (same). First, it misinterprets *Midkiff* as requiring broad deference to the government's condemnation decision even though the putative public use justification, the alleviation of "blight," was only asserted after the fact. *Armendariz* and *Daniels* both hold that deference is inappropriate for such post hoc assertions. *Daniels*, 306 F.3d at 465; *Armendariz*, 75 F.3d at 1321. Second, the decision below conflicts with *Armendariz'* denial of deference to pretextual assertions of public use to justify condemnations intended to benefit private interests. *See id.* The trial court found that the Redevelopment Agency had "turned over all control" of the eminent domain process to the LLC. Pet. App. at 101a. Petitioners presented evidence that "the Agency was acting as a front for the LLC." *Id.* at 95a.

The decision below also misinterprets *Berman* v. *Parker*, 348 U.S. 26 (1954), thereby creating a conflict with *Opinion of the Justices*, 126 N.E.2d 795 (Mass. 1955). The blighted area at issue in *Berman* was characterized by "[m]iserable and disreputable housing conditions." *Berman*, 348 U.S. at 32. Here, the court below upheld the taking of Petitioners' non-blighted property simply because it was located in an area that has experienced

"downward trends" in economic performance or a "loss of sales or visitor volumes." Pet. App. at 20a. By contrast, the Supreme Judicial Court of Massachusetts held that blight alleviation under *Berman* cannot justify condemnations in areas where "there is no suggestion that the area is now a slum." *Opinion of the Justices*, 126 N.E.2d 795, 803 (Mass. 1955).

The decision of the Nevada Supreme Court is at odds with this Court's insistence that property rights under the Takings Clause are accorded the same level of protection as other individual rights. Unchecked power to designate virtually any property as "blighted" and to transfer it to other private interests cannot be reconciled with the principle that "rights in property are basic civil rights" that deserve protection "no less than the right to speak or the right to travel." *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

Granting the Petition and reversing the decision below would not affect the vast majority of condemnations, which either take land directly for government use, or transfer it to private parties in order to advance public uses whose legitimacy is well-established. It would, however, make clear that the power of eminent domain is not a blank check governments may abuse to benefit private interests. As this Court has demonstrated, even very broad powers of government remain subject to constitutional limits.[2]

---

[2] *See, e.g.*, *United States* v. *Lopez*, 514 U.S. 549 (1995) (holding that Congress' broad powers under the Commerce Clause are subject to legal limits, despite a fifty-year assumption to the contrary).

I. The decision below misinterprets *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229 (1984), to permit virtually unlimited government power to condemn property for private uses and conflicts with decisions by the Seventh and Ninth Circuits.

The Public Use Clause,[3] if it is to have any meaning, cannot be interpreted to give government unfettered power to condemn private property "for the benefit of another private person." *Thompson*, 300 U.S. at 80. This "Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Midkiff*, 467 U.S. at 241. "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character . . . That principle grows out of the essential nature of all free governments." *Madisonville Traction Corp.* v. *St. Bernard Mining Corp.*, 196 U.S. 239, 251-52 (1905). Although great deference is granted to legislative determinations of public use, "[i]t is well established that . . . the question [of] what is a public use is a judicial one." *City of Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930).

As the Ninth Circuit pointed out,

> If officials could take private property, even with adequate compensation, simply by deciding

[3] The Public Use Clause was made applicable against the states through the incorporation of the Fifth Amendment under the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 239 (1897); *see also Dolan* v. *City of Tigard*, 512 U.S. 374, 384 n.5 (1994) (reaffirming incorporation of the Takings Clause under the Fourteenth Amendment).

> behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decisions in court merely by positing a 'conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings.

Armendariz, 75 F.3d at 1321; *see also Daniels*, 306 F.3d 445, 461-62 (relying on *Armendariz* to strike down a taking intended to benefit private parties).

A. The decision below would allow the taking of virtually any property.

The decision below misconstrues *Midkiff* to grant, in effect, unlimited government power to condemn property for the benefit of private interests. Although the putative public use justification for taking Petitioners' property was the alleviation of "blight," the Nevada Supreme Court defined blight so broadly as to make it a virtually limitless concept: "Economic blight involves downward trends in the business community, relocation of existing businesses outside of the community, business failures, and loss of sales or visitor volumes." Pet. App. at 20a. Virtually any area periodically experiences "downward trends," the "relocation of existing businesses," business failures, and especially "loss of sales or visitor volumes." *Id.* The city need not resort to the extreme remedy of condemnation in order to alleviate these common problems, but can instead use numerous less drastic means, such as improving infrastructure or extending tax credits to businesses in the area.

Indeed, the so-called blighted area at issue in this case is the renowned "downtown area . . . of the City of Las Vegas." *Id.* at 22a. Under the Nevada court's standards, even the casinos that stand to benefit from this condemnation may be blighted, if they have experienced a "loss of sales or visitor volumes." *Id.* Not surprisingly, neither the

City's property survey nor the Development Agreement makes any reference to the presence of blight in the area in question. Pet. Cert. at 5. Instead, the stated purpose of the Development Agreement was "to enhance employment opportunities, keep companies from leaving the downtown area, attract new businesses to the downtown area, and provide inducement to . . . hotels and other businesses in the downtown area." Pet. Cert. at 4-5.

The approach adopted below would justify any condemnation of property to aid a private business, so long as government officials believe (rightly or wrongly) that the beneficiaries of its condemnation largesse could make more money off the expropriated land than could its present owners. The Public Use Clause would be meaningless if it were interpreted to sanction the transfer of private property from one owner to another simply because the latter would "contribute to positive economic growth in the region," because "incidentally, every lawful business does this." *S.W. Ill. Dev. Auth.* v. *Nat'l City Env.*, 768 N.E.2d 1, 9 (Ill. 2002), *cert. denied,* 537 U.S. 880 (2002) (hereinafter "*SWIDA*"). Although the Nevada Supreme Court may choose to eviscerate the Public Use Clause of its state constitution in this way, it cannot do the same to the Fifth Amendment.

Numerous other state and federal courts have invalidated condemnation where the putative public benefit of increased economic development is achieved indirectly by enriching a private entity.[4] As the Supreme Court of Kentucky explained,

---

[4] *See, e.g., Aaron* v. *Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 2004 WL 190439 (8th Cir. Feb. 3, 2004) (finding owner likely to prevail on claim that condemnation of shopping center to transfer to Target Corporation lacked public use); *99 Cents Only Stores* v. *Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129-31 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th

(Continued on following page)

> If public use were construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or

---

Cir. Mar. 7, 2003) (finding that condemnation to replace one store with a more lucrative one was not a public use); *City of Little Rock* v. *Raines*, 411 S.W.2d 486, 495 (Ark. 1967) (finding private economic development project not a public use); *Baycol, Inc.* v. *Downtown Dev. Auth.*, 315 So.2d 451, 457 (Fla. 1975) ("'[P]ublic benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain."); *Owensboro* v. *McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory."); *Opinion of the Justices*, 131 A.2d 904, 905-06 (Me. 1957) (holding that condemnation for industrial development to enhance economy is not a public use); *Merrill* v. *City of Manchester*, 499 A.2d 216, 217-18 (N.H. 1985) (finding condemnation for industrial park not a public use where no harmful condition was being eliminated); *Ga. Dep't of Transp.* v. *Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that substantial "projected economic benefit" does not justify a condemnation); *Karesh* v. *City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) ("We cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other private shopkeepers."); *Hogue* v. *Port of Seattle*, 341 P.2d 171, 187 (Wash. 1959) (invalidating condemnation of residential property so that agency could "devote it to what it considers a higher and better economic use"); *In re Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping center, where purpose was not elimination of blight). The Michigan Supreme Court is being asked in *County of Wayne* v. *Hathcock*, 2003 WL 1950233 (Mich. Ct. App. Apr. 24, 2003), *app. granted*, 671 N.W.2d 40 (Mich. 2003), to reconsider *Poletown Neighborhood Council* v. *City of Detroit*, 304 N.W.2d 455 (Mich. 1981), which upheld the condemnation of the homes of 4200 people, sixteen churches, and a "historic, racially integrated community" in order to transfer the land to General Motors for the construction of a new factory. *See* Ilya Somin, *Michigan Should Alter Property Grab Rules,* Det. News, Jan. 8, 2004, § A, at 11.

> hotel or like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.

Prestonia Area Neighborhood Ass'n v. *Abramson*, 797 S.W.2d 708, 711 (Ky. 1990) (quotation omitted).

B. The judgment below conflicts with decisions by the Seventh and Ninth Circuits.

The Nevada Supreme Court's validation of the transfer of condemned property to private commercial interests to alleviate "downward trends in the business community," Pet. App. at 20a, conflicts with decisions by the Seventh and Ninth Circuits holding that the Public Use Clause sets clear limits on the power of eminent domain.

Both the Seventh and Ninth Circuits emphasized that courts cannot simply rubber stamp assertions of public use put forward by condemning authorities. *Daniels*, 306 F.3d at 461-62; *Armendariz*, 75 F.3d at 1320-21. The Ninth Circuit held that the judicial branch must prevent takings that are not "for a 'public use,' as the Fifth Amendment requires, but rather for the use of another private person." *Armendariz*, 75 F.3d at 1321. Similarly, the Seventh Circuit concluded that the Public Use Clause does not permit takings whose main purpose is "to confer a private benefit" on business interests in a case where "any speculative public benefit would be incidental at best." *Daniels*, 306 F.3d at 465.

Courts ordinarily accord great deference to legislative determinations of public use. Such determinations are upheld so long as they are "rationally related to a conceivable public purpose" and are not "palpably without a reasonable foundation." *Midkiff*, 467 U.S. at 241. The Seventh and Ninth Circuits have held, however, that such broad deference is not warranted where the putative

public use is offered only to rationalize a condemnation after the fact.

In *Armendariz* v. *Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), owners of low income housing alleged that the City of San Bernardino sought to condemn their property to build a privately owned shopping mall. *Id.* at 1314-15, 1321. The City claimed that it sought to serve the public purpose of "the reduction of urban blight." *Id.* at 1314. The Ninth Circuit refused to defer to the City's assertion because "the Takings Clause would lose all power to restrain government takings" if officials "could take private property . . . simply by deciding behind closed doors that some other use of the property would be a 'public use,'" and "later justify their decisions in court" by concocting "'a conceivable public purpose' to which the taking is rationally related." *Id.* at 1321.

In *Daniels* v. *Area Plan Comm'n*, 306 F.3d 445 (7th Cir. 2002), the Area Plan Commission of Allen County, Indiana, sought to condemn property in a neighborhood restricted by common covenant to residential uses and to transfer ownership to a private developer to construct a shopping center. The Seventh Circuit invalidated the taking because the Area Plan Commission failed to show at the time of the taking that the proposed "commercial development in and of itself would serve some overriding public purpose." *Id.* at 465. The Commission's post hoc determination that the condemnation might serve a "*conceivable* public purpose" did not deserve full deference under *Midkiff*. *Id.* at 465-66 (emphasis in original) (quotation omitted). "Much like the value of the property taken, 'public use' is to be determined at the time of the taking, and at the time of the taking of the restrictive covenant,

the possible future commercial development could not be rationally described as for a public purpose." *Id.* at 465.[5]

Just so here, where the elimination of blight was only asserted after the fact. As Justice Leavitt pointed out below, "there was no evidence of blight in or around the Pappases' property." *Pappas*, Pet. App. at 32a (Leavitt, J., dissenting). Neither the Redevelopment Agreement that led to the condemnation of Petitioners' property nor the 1986 survey on which that agreement was based even mentions the presence of blight in the relevant downtown area. Pet. Cert. at 4-5, 10. According to the trial court, "none of the block surveys" used by the Redevelopment Agency to justify the taking of the Pappases' property "indicate any findings of blight." Pet. App. 47a. Likewise, there is nothing in the record to indicate that the Redevelopment Agency made any specific findings of blight in 1993 when it decided to condemn Petitioners' property. Pet. Cert. at 10-11.[6] Indeed, even some members of the

---

[5] As in *Daniels*, 306 F.3d at 460-61, the failure to find blight at the inception deprived the Downtown Redevelopment Agency of its statutory authority to condemn Petitioners' property. Under Nevada law, eminent domain can only be used to alleviate blight in a "blighted area, the redevelopment of which is necessary to effectuate the public purposes." NEV. REV. STAT. § 279.586(1)(a) (West 2003). Furthermore, Petitioners' property was not contiguous with the rest of the redevelopment area, and the condemning authority must show that "noncontiguous areas of a redevelopment area are blighted or necessary for effective redevelopment" prior to adopting a redevelopment plan. NEV. REV. STAT. § 279.586(1)(f) (2003). The Redevelopment Agency did not make any such showings prior to adopting its redevelopment plan and thus acted *ultra vires* in condemning Petitioners' property. *See* Pet. App. at 31a, 32a (Leavitt, J., dissenting).

[6] The 1986 Redevelopment Plan gave the Agency the generalized power to "eliminate blight." Pet. App. at 48a. However, that authorization does not alter the fact that there was no finding of blight in the area, and therefore no blight to "eliminate." *Id.*

LLC have conceded that there was no blight in the area. *Id.* at 11.

The assertion that condemning Petitioners' property would alleviate blight was only advanced by the Redevelopment Agency as a litigation position after the fact. The Nevada Supreme Court's decision to relieve the Agency of any meaningful obligation to show the validity of this asserted public use cannot be squared with *Armendariz* and *Daniels.*

The Redevelopment Agency's blight rationale was not only advanced after the fact, it was also a mere pretext for a condemnation intended to benefit private business interests. Even many of the casino owners who stand to benefit from the condemnation of the Pappases' property concede that there is no evidence to support the proposition that downtown Las Vegas is blighted. Pet. Cert. 11. The trial court found that the Redevelopment Agency had "turned over all control" of the eminent domain process to the LLC casino interests. Pet. App. 101a. The Pappases presented evidence that "the Agency was acting as a front for the LLC." *Id.* at 95a.[7] Thus, the LLC's private interests, not any determination of public use, led to the condemnation of Petitioners' property.

In *Armendariz*, the Ninth Circuit held that *Midkiff* did not require deference to the City of San Bernardino's

[7] In an analogous case, the Illinois Supreme Court recently invalidated a condemnation to build a racetrack parking lot because the condemning authority's "true intentions were to act as a default broker of land for [the track owner's] proposed parking plan." *SWIDA*, 768 N.E.2d at 10. The condemning agency in *SWIDA* had agreed to condemn "whatever land" the racetrack owners "desired" for the parking lot. *Id.* These facts echo the Redevelopment Agency's willingness to turn over "all control" of the condemnation process to the LLC. Pet. App. at 101a.

claim that its actions served the public purpose of alleviating "blight" because the property owners had presented evidence indicating that this rationale was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price." *Armendariz*, 75 F.3d at 1321. A primarily pretextual claim of public use does not deserve deference because it cannot be considered a true "legislat[ive] judgment of what constitutes a public use," but is rather a mere cover for condemnations designed to benefit private interests. *Midkiff*, 467 U.S. at 240. Numerous state courts have also refused to defer to condemning authorities in cases where the asserted public use was pretextual.[8]

---

[8] *See, e.g.*, *Denver W. Metro. Dist.* v. *Geudner*, 786 P.2d 434, 436-37 (Colo. App. 1989) (finding that flood control was a pretext for enabling sale of government property); *Avalonbay Cmtys., Inc.* v. *Town of Orange*, 775 A.2d 284, 299-303 (Conn. 2001) (upholding injunction against condemnation of private property allegedly to alleviate blight because it was a pretext to preventing the construction of affordable housing); *Wilmington Parking Auth.* v. *Land with Improvements*, 521 A.2d 227, 232-34 (Del. 1986) (finding parking construction was a pretext for extending benefit to private party); *City of Miami* v. *Wolfe*, 150 So.2d 489, 490 (Fla. App. 1963) (affirming finding that extending roadway was a pretext for the acquisition of valuable riparian rights); *Earth Mgmt., Inc.* v. *Heard County*, 283 S.E.2d 455, 460-61 (Ga. 1981) (blocking condemnation nominally for a park but actually intended to prevent construction of waste disposal site); *Pheasant Ridge Ass'n* v. *Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987) (holding that the construction of a park and moderate income housing was a pretext for excluding low income housing); *Casino Reinvestment Dev. Auth.* v. *Banin*, 727 A.2d 102, 103-05 (N.J. Super. Ct. Law Div. 1998) (rejecting pretextual taking intended to benefit casino owned by Donald Trump); *Essex Fells* v. *Kessler Inst.*, 673 A.2d 856, 858 (N.J. Super. Ct. Law Div. 1995) (disallowing borough from condemning property in order to prevent owner from constructing a nursing facility); *Redev. Auth.* v. *Owners*, 274 A.2d 244, 252 (Pa. Cmmw. Ct. 1971) (finding land taken on pretext of removing blight was actually to benefit another private party).

Three United States district courts have recently relied on *Armendariz* and refused to defer to pretextual takings that transfer condemned property to private interests.[9] In all three cases, courts refused deference to a condemnation where the government claimed that expropriation was necessary to alleviate or prevent blight. *Aaron*, 269 F. Supp. 2d at 1174-76; *Cottonwood*, 218 F. Supp. 2d at 1229-30; *99 Cents*, 237 F. Supp. 2d at 1229. A pretextual claim of blight cannot be allowed to justify a taking whose true purpose was "the desire to achieve the naked transfer of property from one private party to another." *99 Cents*, 237 F. Supp. 2d at 1129.

The question of pretext is distinct from that of a post hoc claim, because a pretextual justification is invalid even if asserted prior to or concurrent with the condemnation. *See, e.g., Aaron*, 269 F. Supp. 2d at 1174-76 (rejecting pretextual justification asserted in advance). Conversely, a post hoc assertion of public use is not entitled to deference even if it is not purely pretextual. *See, e.g., Daniels*, 306 F.3d at 461-66. Where, as here, a pretextual justification is presented after the fact, the wrong is doubly compounded.

The Nevada Supreme Court's deference to the Redevelopment Agency's public use assertion despite the evidence of pretext stands in conflict with the teaching of

---

[9] *See Aaron* v. *Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds,* 2004 WL 190439 (8th Cir. Feb. 3, 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr.* v. *Cypress Redev. Agency,* 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002); ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Stores* v. *Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual.").

Armendariz and its progeny that *Midkiff* provides no license for the pretense of public purpose to cloak private greed.

II. The decision below misinterprets *Berman* v. *Parker*, 348 U.S. 26 (1954), to allow condemnation to alleviate "blight" even absent slum-like conditions, and thus conflicts with the Supreme Judicial Court of Massachusetts.

In *Berman* v. *Parker*, this Court held that condemnations adopted for the purpose of eliminating "slums" do not violate the Public Use Clause. *Berman*, 348 U.S. at 32-35. Although the Court held that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive," it also made clear that such deference to condemning authorities is only appropriate when the state adheres to "specific constitutional limitations." *Id.* at 32. Thus, the *Berman* Court emphatically did not sanction an unlimited power to designate property as blighted and then condemn it for the purpose of transferring it to private interests.

The area designated for redevelopment and the use of the eminent domain power in *Berman* was characterized by "[m]iserable and disreputable housing conditions." *Id.* Surveys demonstrated that "64.3% of the dwellings [in the area] were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating." *Id.* at 30. Such conditions are a far cry from the mere "relocation of existing businesses outside of the community, business failures, and loss of sales or visitor volumes" that were considered sufficient to declare an area blighted in *Pappas*. Pet. App. at 20a.

Although the *Berman* Court, in dicta, noted that the legislature may seek to make the "community . . . beautiful as well as healthy, spacious as well as clean," it did not hold that purely esthetic or economic gains are by themselves sufficient to justify the use of condemnation for the alleged purpose of alleviating blight. *Berman*, 348 U.S. at 33. Instead, it limited itself to considering the use of eminent domain to revitalize areas that are characterized by persistent "slum" conditions, "as though possessed of a congenital disease." *Id.* at 34.

The court below interpreted *Berman* to allow the use of condemnation to address "blight" that falls far short of the slum-like conditions addressed in this Court's precedent. According to the Nevada court, *Berman* permits the condemnation of property for the alleged purpose of removing "blight" any time a condemnation is intended to remove "physical, social or economic conditions that affect the health, safety or welfare of a community." Pet. App. 19a, 20a. The court held that "economic blight" sufficient to justify condemnation of property for transfer to private parties exists in any area that has experienced "downward trends in the business community, relocation of existing businesses outside of the community, business failures, and loss of sales or visitor volumes." *Id.* at 20a.

The decision below stretched the definition of "blight" so far that it bears little if any resemblance to the "[m]iserable and disreputable housing conditions" present in the Washington, D.C. neighborhood at issue in *Berman*, 348 U.S. at 32. The trial court below found that there was no evidence of blight or slum-like conditions in any part of the downtown area covered by the Redevelopment Plan. "[N]one of the block surveys completed by the City, and submitted to [the trial] Court, indicate any findings of blight." Pet. App. at 47a. The only evidence of blight cited by the Nevada Supreme Court was that the downtown area suffered from "higher crime rates than the rest of the City of Las Vegas," that there were some vacant buildings

in the area, and that there had been a reduction in economic activity. Pet. App. at 22a. Even if true, these claims fall well short of the slum conditions present in *Berman*.

Virtually any area occasionally experiences declining business conditions, has at least a few vacant lots, and might have higher crime rates than some other parts of the city in which it is located. There are numerous remedies for such difficulties that do not require resort to the drastic compulsion of the power of eminent domain.[10] Indeed, the higher crime rates in downtown Las Vegas relative to the rest of the city may well be explained by the presence of casino businesses in the area. *Cf. Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 185-86 (1994) (noting asserted causal connection between "legalized gambling" and "street, white-collar, and organized crime"). If so, it is ironic that the Redevelopment Agency plans to alleviate these conditions by building a parking lot intended to increase gambling activity.

In validating the condemnation of Petitioners' property based on its highly elastic definition of blight, the Nevada Supreme Court created a conflict with *Opinion of the Justices*, 126 N.E.2d 795 (Mass. 1955). In that case, the Massachusetts legislature sought to authorize condemnation to alleviate "economic blight" in an area that lacked slum-like conditions because it would improve "economic well-being," keep up property values, and reduce crime. *Id.* at 803; *cf. Hogue* v. *Port of Seattle*, 341 P.2d 171, 184-87 (Wash. 1959) (en banc) (citing *Opinion of the Justices* to invalidate a taking where the area in question was not a "slum or blighted area"). Interpreting

---

[10] *See, e.g.*, GEORGE L. KELLING & CATHERINE L. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1998) (describing numerous low cost ways to reduce crime).

the Massachusetts Constitution in light of the *Berman* federal public use standard, the Supreme Judicial Court held that the proposed legislation was unconstitutional because "there is no suggestion that the area is now a slum." *Id.* The court specifically distinguished *Berman* because "[t]he project is not a slum clearance one, and the principle on which rest such cases as . . . *Berman* v. *Parker*, 348 U.S. 26, is not applicable." *Id.*[11]

III. The decision below is incompatible with this Court's case law granting protection to constitutional property rights equal to that accorded to other individual rights.

This Court has emphasized that protection of property rights is essential to liberty more generally because "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 552 (1972); *see also* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992) (describing history of the longstanding American commitment to property as a vital constitutional right and a bulwark of individual liberty more generally); RICHARD PIPES, PROPERTY AND FREEDOM (1999) (presenting evidence of connection between protection of property rights and individual freedom in societies around the world).

---

[11] Although the Massachusetts court was interpreting its own state constitution, it nevertheless addressed a federal constitutional issue because the Court's interpretation of the Massachusetts state Takings Clause was dependent on *Berman's* analysis of the Fifth Amendment. *Opinion of the Justices*, 126 N.E.2d at 803.

That is so because, in the words of Justice John Marshall Harlan, "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions." *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 235. The Framers gave paramount importance to property rights because "property ownership was closely associated with liberty" and a crucial "buffer protecting individuals from governmental coercion." ELY, THE GUARDIAN OF EVERY OTHER RIGHT at 43.

The decision below contradicts this Court's commitment to full constitutional protection for property rights. Virtually any property could be condemned and transferred to other private interests under the elastic definition of "blight" adopted below. Giving government unlimited power to define away a constitutional right is the furthest possible departure from protecting that right on a par with other constitutional liberties.

To be sure, property rights continue to have some protection even under the decision below because owners are entitled to monetary compensation.[12] However, compensation itself does not adequately protect property rights because it converts them to mere "liability rules," under which government may confiscate an individual's rights so long as it is willing to pay a price for the privilege of doing so. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972) (distinguishing true property rights from mere liability protections). The owner's "right to enjoy property without

---

[12] Such compensation often falls far below the true value of the property right to the owner. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 51-56 (1985) (discussing types of losses to property owners that are usually ignored in compensation calculations).

unlawful deprivation," *Lynch*, 405 U.S. at 552, thus becomes nothing more than a mere liability entitlement subject to state-mandated transfer or destruction at any time.

Amici do not urge this Court to apply to the Public Use Clause the same tests that protect other constitutional rights. We submit, however, that the approach adopted by the Nevada Supreme Court has eviscerated the Public Use Clause of any meaning. "State courts, like federal courts, have a constitutional obligation to safeguard personal liberties," *Stone* v. *Powell*, 428 U.S. 465, 494 n.35 (1976), a duty that the court below has abdicated by ignoring the fact that "the question [of] what is a public use is a judicial one." *City of Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ILYA SOMIN
GEORGE MASON UNIV.
SCHOOL OF LAW
3301 N. Fairfax Drive
Arlington, VA 22201
(703) 993-8069

VIET D. DINH
(*Counsel of Record*)
BANCROFT ASSOCIATES, PLLC
2121 Bancroft Place, N.W.
Washington, D.C. 20008
(202) 662-9324

Counsel for Amici

February 6, 2004